85-660

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where respondent, who had been treated for mental problems, walked up to a street patrol officer and confessed to the unsolved killing of a young girl, said that God had told him to confess, and thereafter directed police to evidence corroborating his confession, does the Due Process Clause of the Fourteenth Amendment to the federal constitution, as interpreted by this Court, compel suppression of the confession?

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OPINION BELOW

The opinion of the Colorado Supreme Court in the People of the State of Colorado v. Connelly is reported in 702 P.2d 722 (Colo. 1985). A copy of the

opinion is attached as Exhibit "A".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Writ of Certiorari to the Supreme Court of Colorado is here sought to review the judgment and opinion in The People of the State of Colorado v. Francis Barry Connelly, 702 P.2d 722 (Colo. 1985).

(i) On July 8, 1985, the Colorado Supreme Court issued its opinion in People v. Connelly; and, on July 9, 1985, the court issued its order of remittitur to the trial court. This is the judgment sought to be reviewed.

(ii) This case involved an interlocutory appeal pursuant to Colorado Appellate Rule 4.1, by the People of the State of Colorado (hereafter referred to as "the People" or "the Prosecution") from the trial court's order suppressing defendant Connelly's confession to first degree murder.

Colorado Appellate Rule 4.1(g), Exhibit "B" in the appendix to this Petition, specifically prohibits a petition for rehearing on interlocutory appeals in criminal cases.

On July 18, 1985, the People filed a motion to vacate the remittitur, Exhibit "C" to this petition. On July 19, 1985, the Colorado Supreme Court denied the motion and the appellate judgment thereupon became final.

On September 12, 1985, Justice Byron R. White signed an order, No. A-192, extending the time for filing this petition for writ of certiorari to and including October 6, 1985.

(iii) On August 6, 1985, the state district court set the case for preliminary hearing on August 14, 1985. On August 14, 1985, petitioner asked for a stay of proceedings

to allow a petition for writ of certiorari to be filed in this Court, but the district court declined to rule and set August 28, 1985 for adversary hearing on the requested stay. On August 28, 1985, after the hearing for the requested stay, the court granted the request. Thereafter, respondent asked the Colorado Supreme Court to remove the stay. On August 29, 1985, the Colorado Supreme Court declined to rule on removal of the stay.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., section 1257 and Rule 17.1(c) of the Rules of the Supreme Court. The latter provides that a review on writ of certiorari may be considered "when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

question in a way in conflict with applicable decisions of this Court." U.S. Sup.Ct. Rule 17.1(c).

The date of the Colorado Supreme Court's opinion in the interlocutory appeal was July 8, 1985. The date of the Order that denied the People of the State of Colorado's Motion to Vacate Remittitur is July 19, 1985. Pursuant to U.S. Sup.Ct. Rule 20.1, 28 U.S.C.A., "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment."

CONSTITUTIONAL PROVISION INVOLVED IN THE SUBJECT CASE.

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.Amend. XIV.

CONCISE STATEMENT OF THE CASE

Statement of Pertinent Facts

The factual statement in the Colorado Supreme Court's opinion suffices, with one short addition, for the statement of facts in this petition for certiorari. The following is from pages 4 through 8 of the opinion (Exhibit "A" to this petition), and "the defendant" refers to the respondent in this petition:

> On August 18, 1983, while in uniform on an off-duty assignment in downtown Denver, Officer Anderson of the Denver Police Department was approached by the defendant who told him that "he had killed someone" and wanted to tell the officer about it. The officer noted that the defendant's physical appearance was clean and neat, but the nature of the defendant's statement prompted the officer to ask the defendant whether he had received treatment for any

mental disorders. The defendant stated that he had.

After being informed by the officer of his Miranda rights and stating that he understood those rights, the defendant elaborated further on his initial statement. He told the officer that he had killed a young girl with whom he had been travelling and that the killing occurred near the area of West Mississippi Avenue in Denver during November or December of 1982. The officer then checked the defendant's driver's license for identification and telephoned the Denver Police Department to determine if they had any information on the killing reported by the defendant.

Detective Antuna then arrived at the scene, having ascertained that an unidentified body of a female had been discovered in west Denver in April 1983. After the detective administered a Miranda advisement, the defendant stated that the victim was Marry Anne Junta and that he would be glad to show the officers where the killing occurred. The defendant, Detective Antuna, and another officer then proceeded toward southwest Denver in accordance with directions given by the defendant. The defendant directed the police to a storage structure located near the intersection of Alameda Avenue

and Pecos Street and, becoming visibly agitated, indicated that he had stabbed the victim at this location and had covered her body up with a mattress. Both Officer Anderson and Detective Antuna testified that no promise, force, threat, or coercion was directed against the defendant in interrogating the defendant about the details of the crime.

Dr. Jeffrey Metzner, a psychiatrist whom the court had previously appointed to conduct a competency examination of the defendant, was called as a defense witness and testified that the defendant's statements to the police on August 18, 1983, were not voluntary. This opinion was based in part on the following history which the doctor was able to elicit from the defendant during the competency evaluation. In the late afternoon of August 17, 1983, the defendant began to experience the voice of God telling him to go to Denver from Boston in order to confess his crime to the police. The defendant obeyed the voice and purchased an airplane ticket to Denver on that same evening. After arriving in Denver the defendant spent the night looking for the crime scene and was eventually able to locate it with the help of the voice that was speaking to him. The defendant then considered returning home, but God's voice

> told him he had only two options: he must either confess to the crime or commit suicide. It was at this point that the defendant went to the downtown area of Denver and confessed to the first policeman he was able to find. Dr. Metzner testified that the defendant on August 18, 1983, was suffering from chronic paranoid schizophrenia and that his statements to the police resulted from "command auditory hallucinations," a symptom of his mental disorder. Because, in the doctor's view, persons suffering from such hallucinations feel "as if they have to act on whatever the voice is telling them," the doctor was of the opinion that the defendant was unable to make a free and intelligent decision about whether to speak and confess to the police."

In addition, the evidence in the record of the suppression hearing shows that the respondent also said that the voice of God had told him to do the following: withdraw money from the bank and buy a plane ticket from Boston to Denver; check into a hotel in Denver; revisit the scene of the alleged killing; send $403 in an envelope addressed to his

mother in Boston, who received the money; and, respondent did all those things. He had also planned to send home the key to his motorcycle, but God told him that he did not have the time. Respondent further said that God had told him to buy a razor blade to kill himself or to confess the killing. Respondent then took a bus into downtown Denver, where he walked up to a policeman and confessed.

Statement of Pertinent State Court Proceedings

On March 7, 1984, before preliminary hearing, respondent moved to suppress all his statements and evidence that is the "fruit" of his statements on the grounds inter alia that his confession was "involuntary in that it was not knowingly or intelligently made."

On May 25, 1984, the evidentiary suppression hearing was held before the preliminary hearing, and the district court suppressed respondent's confession.

The court's ruling spanned over seven pages of transcript, of which the following is pertinent to the requirements of Sup.Ct.R. 21.1(h).

> (1) The Court does not need to decide whether or not legally the Defendant was insane at the time of the statements being made, only must find whether or not the Prosecution has proved by a preponderance of the evidence that he was voluntarily giving those statements.
>
> (2) The Court ruled that:
>
> The essence of the admission of the confession is based upon in the Court's estimation and by these cases the fact that there is an element of self-direction in the giving of the statements. I believe this is an overflow of the basic Judeo-Christian ethic of self-determination and free will.

(3) To support its ruling, the court relied upon Townsend v. Sain, 372 U.S. 293 (1962) and Culombe v. Connecticut, 367 U.S. 568 (1961):

(a) The court concluded that the following language of Townsend was "definitive":

> "If an individual's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because coerced. There's no element there, and there's none in the Culombe quote that's cited which indicates that there has to be something done by the police in order to make the confession involuntary."

Townsend, 372 U.S. at 307.

(b) The court further concluded and again ruled:

> The Court feels, therefore, that the confession and all statements made to the police and all directions given by the Defendant in finding and locating the scene of the crime must be -- may not be presented as evidence, not necessarily that they are suppressed, merely under the language of the Culombe case this confession or its admissibility would offend due process...

On June 4, 1984, the People of the State of Colorado took an interlocutory appeal, pursuant to Colorado Appellate Rule 4.1. The People's Opening Brief raised the single issue of the

admissibility of the confession that is the core of this petition for a writ of certiorari. The brief cited Blackburn v. Alabama, 361 U.S. 199 (1960), and Culombe v. Connecticut, 367 U.S. 568 (1961), and contended that they did not compel suppression of the confession in this case. The answer brief of respondent alleged that admission of his confession would deprive him of due process, relying on the Blackburn and Culombe, and Townsend opinions of this Court.

On July 8, 1985, the majority of the Colorado Supreme Court announced its opinion, Exhibit "A" to this petition, in which it affirmed the district court's suppression of respondent's confession to the street patrol officer. The state supreme court stated that its decision was based upon constitutional principles, i.e., the right of the accused to due process, and looked to Lego v. Twomey, 404

U.S. 477 (1972), as well as Blackburn, Culombe, and Townsend, supra, as supporting its decision that the confession here at issue was involuntary. The court declared:

> Given this state of the evidence, it was within the court's prerogative to rule that the defendant's initial statement to Officer Anderson was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action.

LEGAL ARGUMENT

This petition for a writ of certiorari is requested to resolve the issue of whether the Due Process Clause of the Fourteenth Amendment to the federal constitution compels the exclusion from evidence of the respondent's confession.

I. The Confession in Issue.

The respondent's confession, as the Colorado Supreme Court stated in its opinion, "was neither solicited by the

officer nor was the result of any form of police action." People v. Connelly, 702 P.2d 722, 729 (Colo. 1985), Exhibit "A" at p. 22. The record is undisputed that the respondent simply walked up to a uniformed patrol officer on a downtown Denver street and confessed to having killed a 14-year old girl in Denver four months earlier. Before the respondent's confession, the girl's body had already been found, but the killing had remained unsolved. Thereafter, the respondent corroborated his confession by directing police to supporting evidence. His later confession, which involves a Miranda issue, is not an issue in this petition.

The Colorado Supreme Court's opinion unequivocally acknowledged that the respondent's initial confession was not coerced, elicited, or solicited in any way by any state action.

II. The Respondent's Mental Condition.

The record shows that since 1979, the respondent had been committed five times for treatment of mental illness, resulting in institutional stays ranging from a few months to seven days. His most recent release had been in April 1983, after a ten days' stay. The respondent's diagnosis was paranoid schizophrenia, and he had told the court-appointed psychiatrist that he had auditory hallucinations.

III. The Colorado Supreme Court's Holding.

The mental condition of the respondent rendered his confession involuntary on constitutional principles.

The state supreme court held that the respondent's mental condition sufficed in itself to render his confession involuntary -- despite the lack of any state involvement whatsoever in respondent's confession. The court relied for its decision upon the opinions

of this Court interpreting the Due Process Clause of the Fourteenth Amendment as applied to confessions.

IV. The Petitioner's Position.

The respondent's mental condition does not and should not ipso facto render admission of his self-initiated confession a violation of his right to Due Process. Instead, his mental condition should result in one of two alternatives: either the respondent enters a plea of not guilty by reason of insanity; or, the respondent is tried on the first degree murder charge, having been found competent to stand trial.

The petitioner avers that the third alternative, which is the present posture of the case, is based on the misapplication of the Fourteenth Amendment and misperception of this Court's interpretations of the Due Process Clause. The now excluded confession of

the respondent permits him to walk free, because all the state's evidence is derivative from his initial confession to the previously unsolved murder. A local newspaper editor summed up the result of this misapplication of due process in non-legalistic but trenchant words:

> When God talked to Joan of Arc in the 15th century, all she got for the privilege was death at the stake. But the future has brightened. After God talked to Francis Connelly, current resident of the Denver County Jail, Connelly found the visitation far more useful. Why, it may even help him beat a murder charge.
>
> And they say miracles don't happen any more. [Exhibit "E" to this petition, column in full, by Vincent Carroll, Assistant editorial page editor, Rocky Mountain News, July 11, 1985.]

V. <u>The People's Position is Consistent with the Pertinent Decisions of this Court</u>.

The Colorado Supreme Court looked to four opinions of this Court to support its decision excluding evidentiary use of the

respondent's confession to murder, these four opinions are discussed in the order that they appear in the state court opinion.

(1) Lego v. Twomey, 404 U.S. 477 (1972).

The state court cited Lego solely for the well-accepted rule that where voluntariness of a confession is an issue, the prosecution must prove by a preponderance of the evidence that the confession is voluntary.

(2) Townsend v. Sain, 372 U.S. 293 (1963).

The state court stated that "the ultimate test of voluntariness is whether the statement was the product of a rational intellect and a free will", citing Townsend. People v. Connelly, 702 P.2d 722, 728 (Colo. 1983), Exhibit "A", p.17. Townsend, a heroin addict, had been periodically interrogated by police

at several district stations over a period of hours and confessed immediately after a police physician injected him with a "truth serum" drug.

The Townsend Court declared the following standard to apply:

> If an individual's "will was overborne" or if his confession was not "the product of a rational intellect and a free will," his confession is inadmissible because coerced. 372 U.S. at 307. [Emphasis added.]

The Court then stated:

> These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement....Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible. 372 U.S. at 307. [Emphasis on "Any questioning by police officers" added by petitioner; emphasis on "in fact" by court."]

The Townsend standard for a voluntary confession was indisputably, therefore,

applied to a police interrogation setting, without any indication that the standard applies where the claimed coercion is unrelated to any state action. A fortiorari, application of the Townsend standard to the self-motivated confession in the case at bar extends Townsend beyond the import of the opinion.

(3) Culombe v. Connecticut, 367 U.S. 568 (1961).

The Colorado Supreme Court relied upon Culombe for two propositions: First, "If the statement was a product of an essentially rational and free choice by its maker, then it may be used against him at trial; if it was not, the admission of the statement at trial offends due process of law". Secondly, "The issue of voluntariness must be resolved by evaluating the totality of circumstances surrounding the making of the statement". Connelly, 702 P.2d at 728, Exhibit "A".

The totality of the circumstances in Culombe are briefly stated: Culombe, with the mental age of a 9-year old, was taken into police custody, confined, and questioned for more than four days before he confessed.

Again, the Court's opinion is couched in the language of the will of the person confessing being overborne by the police. Thus, the Court pointed out that Culombe's mental retardation was a factor because he was suggestible and subject to intimidation. Culombe, 367 U.S. at 625. Here, Connelly was not subjected to any police questioning or to any improper external pressures.

(4) Blackburn v. Alabama, 361 U.S. 199 (1960).

Blackburn, a psychotic with hallucinations, confessed after police had interrogated him for eight or nine hours in a tiny room, with as many as three

officers present. The Court reversed his conviction, stating that coercion can be mental as well as physical, and declared:

> [T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution that culminates in a conviction. 361 U.S. at 205. [Emphasis added.]

The petitioner reiterates: Connelly accosted a uniformed police officer on the street and spontaneously confessed to a murder -- far removed from the official and protracted police coercion in Blackburn.

CONCLUSION

The petitioner submits that the Due Process Clause of the Fourteenth Amendment and this Court's interpretations of that clause do not compel or justify the Colorado Supreme Court's decision. The effect of the state court's holding is insidious: what one person may call the "voice of God", another may call the

"voice of conscience". Under Connelly, the result is the same: without state action in any form, a person can spontaneously confess to a crime, then state a moral compulsion to confess, and constitutional principles will render the confession involuntary. The crucial question was asked in one of the appended news articles, Exhibit "E", on the Connelly decision: "How is the confession of any guilt-stricken person entirely voluntary, in the sense that it's free of compulsion?"

Respectfully submitted,

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado

By Brooke Wunnicke
BROOKE WUNNICKE
Chief Appellate Deputy District Attorney
(Admitted to this Court on April 29, 1958)

CERTIFICATE OF SERVICE

I do hereby certify that on the 1st day of October, 1985, I placed in the United States mail, postage prepaid and properly sealed and addressed, a copy of the foregoing Petition for Writ of Certiorari to:

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EXHIBIT "A"

SUPREME COURT, STATE OF COLORADO
CASE NO. 84SA270 July 8, 1985

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

FRANCIS BARRY CONNELLY,
Defendant-Appellee.

Interlocutory Appeal, District Court
City and County of Denver
Honorable Paul A. Markson, Jr., Judge

EN BANC JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

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CHIEF JUSTICE QUINN delivered the Opinion of the Court. JUSTICE ERICKSON concurs in part and dissents in part and JUSTICE ROVIRA joins in the concurrence and dissent.

The People, pursuant to C.A.R. 4.1, challenge a ruling of the district court suppressing inculpatory statements made by the defendant and any evidence that might have been derived from those statements. The district court ruled that the defendant was suffering from a severe mental disorder which rendered his statements involuntary and that the prosecution had not met its burden of proving an effective waiver of the defendant's Miranda rights.[1] We affirm in part, reverse in part, and remand with directions.

I.

The defendant was charged with the second degree murder[2] of Marry Anne Junta, allegedly committed in Denver, Colorado, between December 1, 1982, and February 1, 1983. Subsequent to the filing of the charge, the court determined that the defendant was incompetent to stand trial.

After approximately six months of treatment at the Colorado State Hospital the defendant was certified as competent to proceed, and the case was set for a preliminary hearing in the Denver District Court.

Prior to the preliminary hearing the defendant moved to suppress a confession and evidence obtained as a result of the confession. The basis for the suppression motion was that the defendant was mentally incompetent at the time of this confession, thereby rendering his confession involuntary and precluding a valid waiver of his Miranda rights. The defendant requested the court to conduct the suppression hearing in advance of the preliminary hearing. The prosecution made no objection to this procedure, and the district court acquiesced in the defendant's request.

Evidence presented at the suppression

hearing established the following facts. On August 18, 1983, while in uniform on an off-duty assignment in downtown Denver, Officer Anderson of the Denver Police Department was approached by the defendant who told him that "he had killed someone" and wanted to tell the officer about it. The officer noted that the defendant's physical appearance was clean and neat, but the nature of the defendant's statement prompted the officer to ask the defendant whether he had received treatment for any mental disorders. The defendant stated that he had.

After being informed by the officer of his Miranda rights and stating that he understood those rights, the defendant elaborated further on his initial statement. He told the officer that he had killed a young girl with whom he had been travelling and that the killing occurred near the area of West Mississippi

Avenue in Denver during November or December of 1982. The officer then checked the defendant's driver's license for identification and telephoned the Denver Police Department to determine if they had any information on the killing reported by the defendant.

Detective Antuna then arrived at the scene, having ascertained that an unidentified body of a female had been discovered in west Denver in April 1983. After the detective administered a Miranda advisement, the defendant stated that the victim was Marry Anne Junta and that he would be glad to show the officers where the killing occurred. The defendant, Detective Antuna, and another officer then proceeded toward southwest Denver in accordance with directions given by the defendant. The defendant directed the police to a storage structure located near the intersection of Alameda Avenue and

Pecos Street and, becoming visibly agitated, indicated that he had stabbed the victim at this location and had covered her body up with a mattress. Both Officer Anderson and Detective Antuna testified that no promise, force, threat, or coercion was directed against the defendant in interrogating the defendant about the details of the crime.

Dr. Jeffrey Metzner, a psychiatrist whom the court had previously appointed to conduct a competency examination of the defendant, was called as a defense witness and testified that the defendant's statements to the police on August 18, 1983, were not voluntary. This opinion was based in part on the following history which the doctor was able to elicit from the defendant during the competency evaluation. In the late afternoon of August 17, 1983, the defendant began to experience the voice of God telling him to

go to Denver from Boston in order to confess his crime to the police. The defendant obeyed the voice and purchased an airplane ticket to Denver on that same evening. After arriving in Denver the defendant spent the night looking for the crime scene and was eventually able to locate it with the help of the voice that was speaking to him. The defendant then considered returning home, but God's voice told him he had only two options: he must either confess to the crime or commit suicide. It was at this point that the defendant went to the downtown area of Denver and confessed to the first policeman he was able to find. Dr. Metzner testified that the defendant on August 18, 1983, was suffering from chronic paranoid schizophrenia and that his statements to the police resulted from "command auditory hallucinations," a symptom of his mental disorder. Because,

in the doctor's view, persons suffering from such hallucinations feel "as if they have to act on whatever the voice is telling them," the doctor was of the opinion that the defendant was unable to make a free and intelligent decision about whether to speak and confess to the police.

The district court granted the defendant's suppression motion. Although noting that the police had advised the defendant of his Miranda rights, that the defendant had stated he understood those rights, and that the police had not acted improperly in speaking to the defendant and recording his statements, the court found that the defendant did not exercise free will in choosing to speak to the police, but rather was "compelled by his illness to do that which he did." The court thus determined that the prosecution had failed to prove by a preponderance of

the evidence that the defendant's statements to the police on August 18, 1983, were voluntarily made. The court further concluded that, because the defendant's psychosis compelled him to follow the mandate of God and confess to the crime rather than kill himself, the prosecution had not carried its burden of proving by clear and convincing evidence that the defendant had voluntarily, knowingly, and intelligently waived his Miranda rights. The court accordingly suppressed the defendant's confession and all subsequent statements made by the defendant while in police custody. In addition, the court ruled that any evidence that might have been discovered by the police subsequent to the defendant's statements "would be directly related to the Defendant's statements" and, without determining whether such evidence actually existed or its

connection to the defendant's statements, suppressed all such evidence as well.

The People, emphasizing the noncustodial and unsolicited nature of the defendant's first statement to Officer Anderson and the absence of any evidence of police misconduct in the subsequent custodial interrogations of the defendant, argue that the district court erred in suppressing the defendant's initial statement as involuntarily made, also in suppressing his subsequent statements as obtained in violation of the defendant's Miranda rights, and finally in suppressing any evidence that might arguably have been derived from those statements. We conclude that the record of the suppression hearing adequately supports the court's determination that the defendant's initial statement to Officer Anderson was not voluntarily made and that his statements subsequent to his arrest

were not the result of a valid waiver of his Miranda rights. We therefore hold that in the event the defendant is bound over for trial as the result of a preliminary hearing, the defendant's inculpatory statements may not be admitted into evidence at trial. The limited record in this case, however, does not permit us to determine what evidence, if any, might have been derived from the defendant's statements. We accordingly reverse that part of the suppression order relating to the derivative evidence and remand the case to the district court for the purpose of conducting a further hearing in accordance with controlling constitutional principles.

II.

Before resolving the correctness of the suppression order itself, we consider as a preliminary matter the propriety of the procedure adopted by the district

court in hearing and ruling on the defendant's motion to suppress in advance of a preliminary hearing. Although the prosecution did not object to this procedure, we nonetheless believe the matter to be of sufficient importance to address it on our own motion.

The basic purpose of a preliminary hearing is to permit the court to determine whether probable cause exists to believe that the crime charged in the complaint or information was committed by the defendant. E.g., People v. Taylor, 655 P.2d 382 (Colo. 1982); People v. Johnson, 618 P.2d 262 (Colo. 1980). A preliminary hearing serves as a screening device which affords the defendant an early opportunity to challenge the filing of criminal charges against him "by forcing the government to present its evidence to an impartial judge for examination." People v. Quinn, 183

Colo. 245, 249, 516 P.2d 420, 422 (1973). When probable cause is not established, the court is empowered to dismiss the case at an early stage, thereby avoiding the needless expenditure of judicial resources and relieving the accused of the anxiety and financial burden of a criminal trial. Holmes v. District Court of Summit County, 668 P.2d 11 (Colo. 1983).

Because of the limited purpose for which a preliminary hearing is intended, we believe that extending the exclusionary rule to this phase of the criminal process would precipitate a vast array of constitutional issues normally reserved for resolution by the trial court and would thus disrupt the expeditious resolution of the probable cause issue. Furthermore, given the rigid time restrictions for setting a preliminary hearing after a request is made,[3] it is quite obvious that both the defense and

the prosecution would be somewhat hard put to fully litigate suppression issues at this early phase of the criminal process. Requiring suppression motions to be resolved by the court with trial jurisdiction only after probable cause has been determined enhances the orderly processing of cases without in any manner depriving the defendant of a full and fair opportunity to assert issues that relate to the constitutional admissibility of evidence at trial.[4]

We thus conclude that the district court erred in ruling on the defendant's motion to suppress prior to conducting a preliminary hearing on the charge of second degree murder filed against the defendant. This practice contravenes the intended purpose of a preliminary hearing and results in a wasteful expenditure of judicial resources. See United States v. Calandra, 414 U.S. 338 (1974) (grand jury

witness not permitted to invoke exclusionary rule in refusing to answer questions based on evidence obtained from unlawful search and seizure); Gannett Pacific Corp. v. Richardson, 59 Hawaii 224, 580 P.2d 49, 56 (1978) (dictum that "a damaging confession, which may later be suppressed at the trial level on the ground that it was involuntary and illegally obtained by the police, may be admitted at a preliminary hearing"); People ex rel. Pierce v. Thomas, 70 Misc.2d 629, 334 N.Y.S.2d 666 (Sup.Ct. 1972) (questions concerning the legality of a search or the lawfulness of a confession are not germane to the issue of probable cause at a preliminary hearing). On remand of this case the district court should conduct a preliminary hearing without regard to whether or not the evidence submitted by the prosecution satisfies the standards of constitutional

admissibility applicable to a trial on the merits. In ruling on the issue of probable cause, the district court should view the evidence in a light most favorable to the prosecution and should reject only that evidence which is incredible as a matter of law. E.g., Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 (1975).

III.

Although we disapprove of the practice of resolving a suppression motion prior to a preliminary hearing, we nonetheless elect to address the merits of the People's appeal in the interest of judicial economy. There are two categories of statement encompassed by the court's suppression order: (1) the defendant's initial and noncustodial statement to Officer Anderson that he killed someone and wanted to tell the officer about it; (2) the defendant's

custodial statements made to the police after he was taken into custody and advised of his Miranda rights. We consider each category of statement separately.

A.

We find no merit in the People's argument that, because the district court found that the defendant's initial statement was not the result of any questioning by the police, the suppression of the defendant's statement as involuntarily made was erroneous. When an issue is raised as to the voluntariness of a statement made by an accused, the burden is on the prosecution to establish by a preponderance of evidence that the statement was voluntary. E.g., Lego v. Twomey, 404 U.S. 477 (1972); People v. Raffaelli, 647 P.2d 230 (Colo. 1982). The ultimate test of voluntariness is whether the statement was the product

of a rational intellect and a free will. E.g., Townsend v. Sain, 372 U.S. 293 (1963); Raffaelli, 647 P.2d 230. If the statement was a product of an essentially rational and free choice by its maker, then it may be used against him at trial; if it was not, the admission of the statement at trial offends due process of law. Culombe v. Connecticut, 367 U.S. 568 (1961).

The issue of voluntariness must be resolved by evaluating the totality of circumstances surrounding the making of the statement. E.g., Culombe, 367 U.S. 568; Raffaelli, 647 P.2d 230. "Relevant circumstances include the occurrences and events surrounding the confession and the mental condition of the person making the statement." Raffaelli, 647 P.2d at 235. The administration of Miranda warnings before a statement is made does not insulate the statement "from an inquiry

into whether it was voluntarily given." Id. Moreover, the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure. See Blackburn v. Alabama, 361 U.S. 199 (1960).

In Hunter v. People, 655 P.2d 374 (Colo. 1982), we considered the issue whether the trial court erred in admitting into evidence, without a preliminary determination of voluntariness, a confession made by the defendant to a private individual, a department store security guard, after the guard allegedly told the defendant that he would return his driver's license and allow him to leave if the confession were to be signed. We initially noted that a defendant's due process rights are violated if his

conviction is founded in whole or in part upon an involuntary confession, without regard to the sufficiency of the evidence apart from the confession. Addressing the issue of state action, we then stated:

> The Due Process Clause of the Fourteenth Amendment, by its very terms, applies only to state action, and on this basis the People argue that because there was no state action, the defendant's due process rights were not violated. E.g., Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). Clearly, no state action is involved in the accused's making an admission of guilt to a private citizen. State action enters the picture, however, when a trial court permits the prosecution at a jury trial to utilize as evidence of guilt a confession which is extracted under circumstances that so overbear the individual's will as to render the statement involuntary, that is, "not the product of a rational intellect and a free will." Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 90 L.Ed.2d 770 (1963). To avoid the exposure of such a confession to a jury when an accused claims it is involuntary, the trial court must conduct an in camera hearing to avoid a violation of

> the accused's due process rights. Here, the defendant maintained that his signed confession was involuntary and should not be admitted as evidence before a jury. Under the facts of this case, the admission of the signed confession triggered a valid claim that the defendant's due process rights had been violated.

655 P.2d at 375-76.

The record in this case supports the district court's determination that the defendant's initial statement to Officer Anderson on August 18, 1983, was not voluntary. The testimony of Dr. Metzner established that the defendant on this occasion was suffering from a serious mental disorder which placed him in the dilemma of confessing his crime to the police or committing suicide. Given this state of the evidence, it was within the court's prerogative to rule that the defendant's initial statement to Officer Anderson was not the product of a rational intellect and a free will notwithstanding

the fact that this statement was neither solicited by the officer nor was the result of any form of police action.

B.

We also reject the People's argument that the district court erred in suppressing the defendant's custodial statements as obtained in violation of his Miranda rights. A separate consideration in ruling on a motion to suppress is whether, prior to the onset of custodial interrogation, the defendant has been properly advised of his Miranda rights and has validly waived effectuation of those rights. Custodial interrogation conducted in violation of Miranda creates a presumption of compulsion. Oregon v. Elstad, ___ U.S. ___, ___, 105 S.Ct. 1285, 1292 (1985); New York v. Quarles, 467 U.S. ___, ___, 104 S.Ct. 2626, 2631 (1984). The prosecution, therefore, bears the burden

of proving by clear and convincing evidence that the defendant voluntarily, knowingly, and intelligently waived his Miranda rights. People v. Fish, 660 P.2d 505 (Colo. 1983); People v. Lowe, 200 Colo. 470, 616 P.2d 118 (1980).

In light of the psychiatric testimony presented to the district court, we see no reason to disturb the court's conclusion that the prosecution failed to prove by clear and convincing evidence that the defendant effectively waived his Miranda rights. The testimony of Dr. Metzner clearly established that the defendant's mental condition on August 18, 1983, was such that he was incapable of making an intelligent and free decision with respect to his constitutional right of silence while in custody and his constitutional right of silence while in custody and his constitutional right to confer with a lawyer before talking to the police. We

therefore affirm the suppression order insofar as it prohibits the prosecution from using at trial the defendant's inculpatory statements made on August 18, 1983.

IV.

We last consider whether the district court properly suppressed any and all evidence discovered by the police subsequent to August 18, 1983, as the illegal product of the defendant's inculpatory statements. The derivative evidence rule, which serves to exclude evidence obtained as a result of a violation of the defendant's constitutional rights, applies not only to Fourth Amendment violations but to Fifth and Sixth Amendment violations as well. Nix v. Williams, ____ U.S. ___, ___, 104 S.Ct. 2501, 2508 (1984). Thus, if an involuntary custodial statement is obtained from a defendant without a valid

waiver of Miranda rights, evidence subsequently obtained by the police as a result of the constitutional violation may be suppressible as the fruit of the initial illegality. People v. Lee, 630 P.2d 583 (Colo. 1981); People v. Saiz, 620 P.2d 15 (Colo. 1980); Lowe, 200 Colo. 470, 616 P.2d 118. The prosecution in such a case bears the burden of proving that any evidence sought to be admitted was not acquired as the result of the constitutional violation. The prosecution may meet this burden by establishing that the challenged evidence was obtained from a source independent of the illegality, Wong Sun v. United States, 371 U.S. 471 (1963), that the challenged evidence is sufficiently attenuated from the initial interrogation to permit its admission at trial, United States v. Ceccolini, 435 U.S. 268 (1978), or that the evidence might inevitably have been discovered

notwithstanding the constitutional violation, Williams, ___ U.S. ___, 104 S.Ct. 2501.

The record in this case is totally devoid of any evidence establishing either the nature of the derivative evidence suppressed by the court or the nexus, if any, between the defendant's inculpatory statements and the derivative evidence. What we are confronted with, therefore, is a blanket suppression order which is not only unsupported by evidence in the record but is also lacking in basic factual findings necessary for a meaningful appellate review. We therefore reverse the suppression of derivative evidence and remand for further proceedings on this aspect of the case. The district court should apply the principles outlined above in resolving any issues relating to evidence that the defendant claims was

obtained as the result of his statements on August 18, 1983.

V.

Because the district court improperly ruled on the defendant's motion to suppress prior to a preliminary hearing, we remand the case to the district court for a preliminary hearing. In the event the court finds probable cause and orders the defendant bound over for trial, the court need not rehear the defendant's motion to suppress the inculpatory statements of August 18, 1983, as that part of the suppression ruling is affirmed. We reverse, however, that part of the suppression ruling relating to derivative evidence and direct the district court, if probable cause is found, to conduct a further suppression hearing on this aspect of the case in accordance with the views herein expressed.

JUSTICE ERICKSON concurs in part and dissents in part and JUSTICE ROVIRA joins in the concurrence and dissent.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

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[2] Section 18-3-103(1)(a), 8 C.R.S. (1978). The defendant was also charged in a second count with a crime of violence in violation of section 16-11-309, 8 C.R.S. (1984 Supp.).

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[3] Crim.P. 5(a)(4)(I) states in relevant part as follows:

> Within ten days after the defendant is brought before the county court, either the prosecuting attorney or the defendant may file a written motion for a preliminary hearing. Upon the filing of such a motion, the judge forthwith shall set the hearing. The hearing shall be held within thirty days of the day of the setting, unless good cause for continuing the hearing beyond that time be shown to the court.

Crim.P. 7(h)(1), in similar fashion, states that when a direct information is filed in the district court and either the defendant or the prosecuting attorney files a written motion requesting a preliminary hearing, the district judge shall set the hearing within thirty days of the setting, unless good cause for continuing the hearing beyond that period be shown to the court.

We recognize that there may be unique circumstances which justify a district court's consideration of a motion to dismiss criminal charges prior to a preliminary hearing. In People v. Manning, 672 P.2d 499 (Colo. 1983), for example, both the prosecution and defense, prior to a preliminary hearing, requested the district court to rule on the defendant's motion to dismiss, which was based on an alleged breach of a governmental promise not to prosecute the defendant in exchange for information from the defendant about the whereabouts of her missing child. Given these circumstances, the district court in Manning did not abuse its discretion in determining whether the scope of the governmental promise was such as to preclude any and all criminal proceedings, including a preliminary hearing, from taking place against the defendant or, alternatively, whether a lesser sanction such as the suppression of evidence was appropriate. In contrast to the Manning case, however, the defendant's motion in the instant matter went only to the suppression of evidence and not to the dismissal of charges.

JUSTICE ERICKSON concurring in part and dissenting in part:

I concur in the majority's analysis and resolution of the procedural issues in this case. The district court, in my opinion, erred in ruling on the defendant's motion to suppress prior to the preliminary hearing. The majority opinion properly addresses and reviews the scope of admissible evidence at the preliminary hearing. I differ with the majority, however, on the admissibility of the defendant's spontaneous and unsolicited statements to Officer Anderson and dissent to the exclusion of that evidence and evidence derived from that statement.

The record shows that the defendant approached Officer Anderson and volunteered that "he had killed someone," and wanted to tell the police about it.

The defendant's initial statement, which he volunteered prior to the Miranda warning, was completely spontaneous and was not elicited by police questioning of any kind. In my opinion, that statement, together with the evidence derived from the independent police investigation, is admissible at the defendant's trial. Nix v. Williams, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

It is axiomatic that a confession is admissible in evidence only if it is voluntarily given. Jackson v. Denno, 378 U.S. 368 (1964). To satisfy the test of voluntariness, a confession "must not be extracted by any sort of threats or violence, nor be obtained by any direct or implied promises, however slight." Brady v. United States, 397 U.S. 742 (1970); People v. Raffaelli, 647 P.2d 230, 235 (Colo. 1982); People v. Parada, 188 Colo. 230, 234, 533 P.2d 1121, 1123 (1975). In

my view, a statement can be suppressed as involuntary only if it has been extracted by police questioning or obtained through improper external force. See B. George, Constitutional Limitations on Evidence in Criminal Cases 259-61 (1973). Statements which a defendant volunteers independent of police questioning or external force should not be subject to suppression under the fifth amendment. See, e.g., Commonwealth v. Powell, 459 Pa. 253, 328 A.2d 507 (1974); Nevels v. State, 216 So.2d 529 (Miss. 1968); People v. Savage, 102 Ill.App.2d 477, 242 N.E.2d 446 (1968); Crummel v. State, 46 Wis. 2d 348, 174 N.W.2d 517 (1970) (the spontaneity of the declarations by defendant corroborates the voluntariness of the statements).

Rhode Island v. Innis, 446 U.S. 291 (1980), supports my conclusion that the initial statement should be admitted into evidence. In Innis, the defendant was in

custody and reacted to a conversation between his two police custodians by volunteering information about the crime under investigation. The defendant's statement to the police was found to be proper because it was not obtained by police interrogation. Here, the defendant was not in custody and spontaneously told Officer Anderson about the crime. The defendant was not questioned until after Miranda warnings were given.

The defendant's motivation for confessing in this case was not tied to police questioning or external pressures of any kind. Compare Blackburn v. Alabama, 361 U.S. 199 (1960); Townsend v. Sain, 372 U.S. 293 (1963); Hunter v. People, 655 P.2d 374 (Colo. 1982).[1] The defendant's statement demonstrated his desire to acknowledge his past crime so that he could purge himself of guilt. The "internal voices" that compelled his

confession were part and parcel of his own psychological makeup. The defendant initiated the contact with Officer Anderson and his conduct and statement should be admissible at trial on the issue of his mental condition as well as his guilt.[2] While the defendant's mental condition may be introduced at trial to attack the credibility of his confession or to establish nonresponsibility for the crime committed, the defendant's mental illness should not preclude a finding that his statement was voluntary for purposes of the fifth amendment. See State v. Boan, 235 Kan. 800, 686 P.2d 160 (1984); State v. Wright, 219 Kan. 808, 549 P.2d 958 (1976); State v. Ratow, 4 Wash App. 321, 481 P.2d 20, cert. denied, 404 U.S. 944 (1971).

The majority opinion essentially requires police officers to close their eyes and ears when openly approached with

evidence that a crime has been committed. I perceive no constitutional basis that would compel such a result. In my view, the defendant's initial statement to the police is admissible evidence.

I am authorized to say that JUSTICE ROVIRA joins in this concurrence and dissent.

[1] The majority cites Blackburn as holding that "[o]ne's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." Slip op. at 11. In my opinion, Blackburn does not stand for the proposition for which it is cited. In Blackburn, the police subjected the defendant, who had a long history of mental illness, to eight hours of sustained interrogation in a small office which was at times filled with police officers. Based on these facts, the Court concluded that Blackburn's confession had not been voluntarily obtained. The defendant's mental illness was but one factor relied on by the Court in reaching its decision. Contrary to the majority's suggestion, Blackburn does not hold that mental illness alone can render a statement involuntary for purposes of the fifth amendment.

The majority's reliance on Hunter v. People is equally misplaced. In Hunter, we suppressed a statement obtained by a

security officer who had the defendants drivers license and refused to release the defendant or return the license until the statement was signed. Given these facts, we held that Hunter's confession had obviously been coerced and could not be used by the prosecution at trial. The facts in this case are quite different. The only pressure was from within the defendant himself, and that is only demonstrated by the testimony of a psychiatrist who has given his opinion on what the defendant's mental condition was the time he had made his statements to the police. The opinion of the psychiatrist was based solely on what the defendant told him. Other psychiatrists might well reach a different conclusion. In any event, the issue of competence and weight to be afforded the initial statement should be resolved at the time of trial.

---

[2] The procedure to be followed in cases where sanity is an issue is statutorily prescribed. The defense of insanity in a criminal case must be raised by a special plea. Section 16-8-103, 8 C.R.S. (1978). In reviewing a defense in a criminal case predicated on lack of mental capacity two issues are paramount. First, whether the accused is competent to stand trial or proceed. See section 16-8-111, 8 C.R.S. (1978); ABA Mental Health Standards, 7-4.1. See also Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). The second issue is whether the accused by reason of his mental condition at the time of the alleged commission of the offense is responsible for his conduct. Section 16-8-105, 8 C.R.S. (1978); ABA Mental Health Standards, 7-6.1.

EXHIBIT "B"

COLORADO APPELLATE RULES 4.1
INTERLOCUTORY APPEALS
IN CRIMINAL CASES

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.

EXHIBIT "C"

SUPREME COURT, STATE OF COLORADO

Case No. 84SA270

MOTION TO VACATE REMITTITUR

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

FRANCIS BARRY CONNELLY,

Defendant-Appellee.

The People of the State of Colorado, by and through Norman S. Early, Jr., District Attorney within and for the Second Judicial District, and by his duly appointed Deputy, Brooke Wunnicke, move to vacate the remittitur ordered in this case on July 9 and received July 11, 1985.

As grounds for this motion, the People allege that:

1. C.A.R. 4.1(g) prohibits a petition for rehearing on interlocutory appeals in criminal cases.

2. The opinion of the Supreme Court of Colorado, issued July 8, 1985, is, therefore, a final judgment.

3. The People of the State of Colorado intend to seek review of that final judgment by filing a Petition for Writ of Certiorari in the Supreme Court of the United States.

4. This matter should not, therefore, be remitted to the trial court until completion of review by the Supreme Court of the United States.

WHEREFORE, the People ask this court to vacate its order of remittitur in this matter, issued July 9, 1984 [sic] and received July 11, 1985.

Respectfully submitted July 18, 1985.

NORMAN S. EARLY, JR.
District Attorney
Second Judicial District
State of Colorado

BY: Brooke Wunnicke

BROOKE WUNNICKE, Reg. No. 4854
Chief Appellate Deputy
District Attorney

303 West Colfax Avenue
Denver, Colorado 80204
Telephone: 575-5933

CERTIFICATE OF MAILING

I certify that on July 18, 1985, I placed in the United States mail, postage prepaid and properly sealed and addressed, a true and complete copy of the foregoing MOTION TO VACATE REMITTITUR, to:

DAVID VELA,
Colorado State Public Defender
Abelardo P. Bernal
Deputy State Public Defender
331 14th Street
Denver, Colorado 80202

Brooke Wunnicke

Brooke Wunnicke

EXHIBIT "D"

SUPREME COURT, STATE OF COLORADO
Case No. 84 SA 270
INTERLOCUTORY APPEAL FROM THE DISTRICT COURT, CITY AND COUNTY OF DENVER

ORDER OF COURT

PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

vs.

FRANCIS BARRY CONNELLY,
Defendant-Appellee.

Upon consideration of the Motion to Vacate Remittitur filed by counsel for Plaintiff-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, JULY 19, 1985

cc: Brooke Wunnicke
Chief Appellate Deputy
District Attorney

Abelardo P. Bernal
Deputy State Public Defender
331 - 14th Street
Denver, CO 80202

EXHIBIT "E"

Colorado court pushes frontiers of insanity

WHEN God talked to Joan of Arc in the 15th century, all she got for the privilege was death at the stake. But the future has brightened. After God talked to Francis Connelly, current resident of the Denver County Jail, Connelly found the visitation far more useful. Why, it may even help him beat a murder charge.

Vincent Carroll

And they say miracles don't happen any more.

The story is that God told Connelly to confess to a killing, which he dutifully did. He could either have confessed or committed suicide. That's how Connelly describes his choice, anyway, and the Colorado Supreme Court so much admired his sincerity that it has just ruled his confession doesn't count. The defendant lacked free will, the court majority said, without which no admission of guilt would be complete.

Understand that Connelly might be innocent. Naturally. All he did was show up in Denver two years ago, accost the nearest cop, and tell him he'd "killed someone" nearly 10 months earlier — a girl, it turns out, whose body had not even been firmly identified.

But Connelly knew a name. One that fit. Oh, yes, this former Boston resident knew quite a lot, enough to lead two policemen, after the Miranda warnings, to a site where he claimed 14-year-old Marry Anne Junta had died.

You might well wonder how the Supreme Court can be sure Connelly lacked free will on a single day in 1983. After all, couldn't his internal goad have been just another name for conscience?

Silly you. The court knows because a psychiatrist says so, and the psychiatrist knows because Connelly says so. Dr. Jeffrey Metzner interviewed Connelly a few weeks after his arrest, not long before the defendant was initially found incompetent to stand trial and sent to Colorado State Hospital. Metzner saw him again in February and this time decided, as hospital staff had concluded before him, that Connelly was now fit for the courtroom.

However, Metzner stuck by his original opinion that the confession had been involuntary. In the language of the trade, Connelly was a paranoid schizophrenic suffering "command auditory hallucinations." These words were enough for both the district court and Supreme Court. The confession was dead.

According to Keith Johnson, chief deputy district attorney, Metzner "tends to find more people insane — more than I would like anyway." But whatever the value of a psychiatrist's opinion, he can't really be blamed for how it is used by a court. Even if defendants don't always enjoy free will, presumably most judges do.

Yet in throwing out the confession, the Supreme Court quite probably demolished the entire case.

"We've got nothing left . . . or at least we've got very little," admits Johnson.

Curiously, the court sidestepped this fact. It solemnly declared it wouldn't rule on "what evidence, if any, might have been derived from the defendant's statements" and therefore also be tainted. But in fact virtually *all* evidence followed the confession, as the court fully well knew.

In short, the state Supreme Court has continued its trek toward the frontiers of judicial eccentricity. Is there another high court in the land, save perhaps California's, that so consistently suppresses evidence on bizarre technical grounds?

Justice William Erickson took the measure of this decision in a strong dissent, written with the concurrence of Justice Luis Rovira. "The majority opinion essentially requires police officers to close their eyes and ears when openly approached with evidence," Erickson wrote.

"In my view," he added, "a statement can be suppressed as involuntary only if it has been extracted by police questioning or obtained through improper external force."

Erickson went on to say that a patient's mental condition is relevant just to the extent it undermines the credibility of his statement or establishes his "non-responsibility" for the crime committed — in the manner of John Hinckley Jr., for example. Connelly is no model of stability, of course, but it is one thing to find a man not guilty of a crime by reason of insanity and quite another to throw out his confession because he thinks it was prompted by a higher power. Are police in Colorado now required, in addition to reading a suspect his rights, to assess the person's mental condition and refuse to investigate leads if they conclude he is unbalanced or schizophrenic?

If so, why not suppress all unsolicited admissions of guilt? Isn't a conscience merely the mix of values, empathy, instinct and — yes — religious belief that compel a person to act in a socially acceptable fashion, even if it goes against his short-term interest? How is the confession of *any* guilt-stricken person entirely voluntary, in the sense that it's free of compulsion?

Perhaps next time the Supreme Court should find an expert who will go the distance — if not a psychiatrist then a behavioral psychologist — someone who will contend that no confession is ever the product of free will, that free will is in fact a sham.

Surely the court should find that notion appealing: It's simple but abstract, and it's a bold departure in legal theory. Best of all, though, it helps the guilty go free.

Vincent Carroll is assistant editorial page editor.

EXHIBIT "F"

Rocky Mountain News

Founded April 23, 1859

Ralph Looney
Editor

William W. Fletcher
President, General Manager

"Give light and the people will find their own way."

Case cries for reversal

CONGRATULATIONS are in order for the Denver District Attorney's office, which has decided to challenge an outrageous decision by the Colorado Supreme Court. In their search for common sense, district attorneys will attempt to take their case to the highest tribunal in the land.

You may remember the bizarre ruling in question. It involved a man named Francis Connelly, who, on one fine day in 1983, accosted a city policeman and told him he'd murdered a girl a few months earlier. Connelly then proceeded to lead police to a site where an unidentified body had indeed been found. With information he provided, police soon discovered the girl's name.

> This case adds an ugly twist to defense lawyers' options.

A prosecutor's dream? By no means. Suddenly, Connelly revealed he'd had a visitation from God before confessing; in fact, it seems God ordered him into the undertaking. Public defenders seized upon this to argue his confession was involuntary — you know, exactly as if a few rogue police officers had hustled Connelly down to a basement and worked him over with rubber hoses.

Don't dare laugh, either, because the Supreme Court bought this sophistry after a push from an agreeable psychiatrist.

It's bad enough that some offenders already escape lengthy incarceration through insanity pleas. At least, however, they're put away in mental hospitals after a trial. This case adds an ugly twist to defense lawyers' options. As Deputy District Attorney Gilberto Espinoza says, "If this (ruling) stands, we may never be able to use any confession if an individual said he felt a compulsion to confess for whatever reason."

Not only won't the criminally insane go to jail, they may not even be tried.

In short, this ruling is on par with the state court's eccentric Quintero opinion of a couple years ago. In that case, the court ruled that police had no right to arrest a man in a neighborhood that had recently been burglarized, even though he had wrapped a TV set and video game under his shirt and his pockets were later found carrying jewelry. Unfortunately, the defendant died before the U.S. Supreme Court could hear that appeal.

It would be nice if local prosecutors could obtain a repudiation of at least one instance of the state high court's too-frequent forays into hair-splitting technicalities. If there is a better candidate than the Connelly case, we can't think of it.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 85-660

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBIN DESMOND
Deputy State Public Defender

ABELARDO PEREZ BERNAL, Jr.
Deputy State Public Defender
A member of the Bar of this Court

ATTORNEYS FOR RESPONDENT
331 14th Street
Denver, Colorado 80202

18pp

QUESTION PRESENTED FOR REVIEW

Did the prosecution meet its burden of proving that Respondent's statements were admissible, where unrebutted expert testimony established that these statements were not volitional but were involuntary and the product of command auditory hallucinations of a paranoid schizophrenic in active psychosis?

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No. 85-660

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Francis Barry Connelly respectfully requests that the Petition for Writ of Certiorari filed by the State of Colorado be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

Colorado Constitution, Article II, Section 18:

No person shall be compelled to testify against himself in a criminal case nor shall any person be twice put in jeopardy for the same offense. If the jury disagrees, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Colorado Constitution, Article II, Section 25:

No person shall be deprived of life, liberty or property, without due process of law.

United States Constitution, Amendment XIV:

SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due pro-

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 18, 1983, Respondent Francis Barry Connelly walked up to a uniformed police officer in Denver, Colorado, and said he had killed someone and wanted to tell the officer about it. Officer Anderson advised Mr. Connelly of his rights in accordance with Miranda v. Arizona,[1] conducted a brief search for weapons and placed handcuffs on Mr. Connelly. After the Miranda advisement, Mr. Connelly told the officer that, in late 1982, he had killed a girl with whom he had been traveling in Denver.

The officer contacted a detective, who asked Mr. Connelly additional questions and took him to police headquarters. Mr. Connelly identified the girl he had killed as Mary Anne Junta and later took detectives to the location where he had killed her and left the body. The body had been discovered in April 1983, but had not been identified.

Mr. Connelly was charged with Second Degree Murder, in violation of Colo. Rev. Stat. §18-3-103 (1978 Repl. Vol. 8). The Petition for Certiorari incorrectly states that first degree murder charges were filed. Mr. Connelly was declared incompetent to proceed and was treated at the Colorado State Hospital for approximately six months. After being found competent, Mr. Connelly filed a Motion to Suppress Statements and Evidence. This motion requested the suppression of Mr. Connelly's statements to police because they were not voluntary and because he had not knowingly, intelligently and voluntarily waived his Miranda rights. (Exhibit 1).

A suppression hearing was held on May 25, 1984. Dr. Jeffrey Metzner, a psychiatrist who had examined Mr. Connelly at the state hospital, testified as an expert witness. According to Dr. Metzner, Mr. Connelly suffered from chronic paranoid schizophrenia and had experienced auditory hallucinations which had compelled his confession.

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[1] 384 U.S. 436 (1966).

Dr. Metzner classified Mr. Connelly's auditory hallucinations as "command" hallucinations, which had a powerful effect on "his ability to make free and rational choices." (Reporter's transcript, Exhibit 2, p. 56). Mr. Connelly had described the voice he heard as God's voice, and told Dr. Metzner that God was his own father, now dead, and that he was Jesus Christ. (Exhibit 2, p. 55). This voice commanded him on August 17, 1983 to travel from his home in Boston to Denver and to confess to a policeman. (Exhibit 2, p. 52). After Mr. Connelly arrived in Denver, the voice told him that he had only two choices --to confess or to kill himself. (Exhibit 2, p. 53).

Dr. Metzner concluded that Mr. Connelly had been unable to make a free and intelligent decision to make a statement. Mr. Connelly felt that he had no choice about making a confession, and felt that he had to act on his command from God. (Exhibit 2, pp. 58-59). According to Dr. Metzner, Mr. Connelly did not confess merely as a result of a guilty conscience but because he was psychotic at the time. (Exhibit 2, pp. 64-65). Dr. Metzner believed that Mr. Connelly's psychotic episode had begun at least as early as August 17, 1983, when he left Boston for Denver. (Exhibit 2, p.69).

The prosecution presented no expert testimony to rebut Dr. Metzner's opinion. The patrol officer and a detective, to whom Mr. Connelly spoke on August 18, 1983, testified that he did not appear to be mentally ill. However, Dr. Metzner testified that Mr. Connelly's psychosis was such that his behavior would have appeared normal to most observers. (Exhibit 2, pp. 61-62).

At the conclusion of the suppression hearing, the trial court found:

> [T]here's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both of which were mandated by auditory hallucination, had no basis in reality and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner

> which is not unusual for people who suffer schizophrenia. He was able to do so so that trained, experienced police officers were not able to discern the mental difficulty that the Defendant was having.

(Exhibit 2, pp.88-89). The trial court ruled that the prosecution had not met its burden of proving by a preponderance of the evidence that Mr. Connelly's statement was voluntary. Additionally, the trial court ruled that the prosecution had failed to prove by clear and convincing evidence that Mr. Connelly had voluntarily, knowingly and intelligently waived his Miranda rights.

The trial court's rulings were affirmed in the prosecution's interlocutory appeal to the Colorado Supreme Court. According to the supreme court, the evidence in the record clearly supported the district court's conclusion.

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COLORADO SUPREME COURT WAS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has historically and consistently refused to review decisions which rest upon adequate and independent state grounds. Michigan v. Long, 463 U.S. 1032 (1983), Fox Film Corporation v. Muller, 296 U.S. 207, 210, (1935). The opinion of the Colorado Supreme Court in People v. Connelly, 702 P.2d 722 (1985), is based upon such grounds. Therefore, the state's petition for a Writ of Certiorari should be denied.

It has long been settled that were the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, this Court has no jurisdiction if the nonfederal ground is independent of the federal, and is adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. at 210; Klinger v. Missouri, 13 Wall. 257, 263, (1872). The basis for this rule has been described as follows:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judg-

> ments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 342 U.S. 117, 125-26 (1945).

As this Court has recognized, the test of voluntariness has been clearly established "in Anglo-American courts for two hundred years." Culombe v. Connecticut, 367 U.S. 568, 602 (1961). Colorado has a long history of cases dealing with voluntariness issues. In 1899, the Colorado Supreme Court recognized and addressed the issue of voluntariness in Fincher v. People, 210 Colo. 169, 56 P.902 (1899). In 1905, the Colorado Supreme Court relied on existing nonfederal law and on Article II, Section 18 of the Colorado Constitution in addressing the voluntariness of a defendant's statements to a coroner's jury. Tuttle v. People, 33 Colo. 243, 79 P.1035 (1905).

> [T]he important question to determine in cases of this character is, was the statement voluntary? If this question can be answered in the affirmative, then the statement is clearly admissible on a principle, the soundness of which is not disputed; but, is not voluntary, or if obtained by any degree of coercion, then it must be rejected. No hard and fast rule can be formulated which would serve as the test in every instance, but each case must be determined upon its own circumstances.

79 P. at 1038. (Emphasis added).

In 1927, the Colorado Supreme Court again addressed the issue of voluntariness in Osborn v. People, 83 Colo. 4, 262 P.892 (1928). Citing only Colorado case law, the Court relied on Fincher v. People, and Tuttle v. People and reaffirmed that to be admissible, a confession must be voluntary, and the the question of admissibility is for the court.

This line of cases forms the basis for subsequent Colorado Supreme Court decisions on voluntariness. More recent Colorado cases adhere to these long-established principles of voluntariness. See, e.g., Keener v. People, 194 Colo. 244, 572 P.2d 463 (1977) (Erickson, J., concurring); People v. York, 189 Colo. 16, 537 P.2d 294 (1975); People v. Shearer, 181 Colo. 237, 508 P.2d 263

(1968); Gould v. People, 167 Colo. 113, 445 P.2d 580 (1968).

The state supreme court in Connelly relied on only four decisions of this Court, which stand only for fundamental principles of law and do not supplant the long history of Colorado voluntariness cases. As Petitioner has conceded, the Connelly court cited Lego v. Twomey, 404 U.S. 477 (1972), only for the "well accepted rule" that prosecutors must prove voluntariness by a preponderance of the evidence. The court also relied for this principle upon one of its earlier decisions, People v. Raffaelli, 647 P.2d 230 (Colo. 1982).

The court in Connelly similarly relied on the Raffaelli opinion, as well as Townsend v. Sain, 372 U.S. 293 (1963), to describe the well-established standard for evaluating the voluntariness of a statement: "whether the statement was the product of a rational intellect and a free will" 702 P.2d at 728. The Raffaelli opinion also was cited, along with Culombe v. Connecticut, 367 U.S. 568 (1961), for the basic principle that the totality of the circumstances surrounding a statement must be considered in determining its voluntariness. In each instance, the Colorado Supreme Court indicated that it was citing Raffaelli and Lego, Townsend and Culombe only as examples of the fundamental propositions used in its analysis in Connelly. This is apparent because the Colorado Supreme Court prefaced its citations to these cases with the signal, "E.g.," which means "for example." Black's Law Dictionary 462 (5th Ed. 1979).

The Colorado Supreme Court relied on a decision of this Court as direct authority only once in addressing the voluntariness of Mr. Connelly's statements to police. The opinion below cites Culombe as authority for the principle that due process of law is violated if the prosecution uses at trial a statement which is not the "product of an essentially rational and free choice by its maker." 702 P.2d at 728. However, the Colorado Supreme Court in Raffaelli recognized that the due process clause of the United States Constitution precludes the admission of involuntary confessions and stated, "Our state constitution requires no less."

647 P.2d at 234.

The thrust of Petitioner's argument is that police coercion or inducement must be established before a statement can be excluded as involuntary. After concluding that a statement may be involuntary in the absence of police coercion or duress, the Colorado Supreme Court in Connelly noted that the "capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." 702 P.2d at 728. The opinion below refers to Blackburn v. Alabama, 361 U.S. 199 (1960), with a "See" signal, indicating that the state supreme court considered Blackburn as only indirect authority.

In concluding that Mr. Connelly's statements were involuntary although they were not the result of police coercion or inducement, the court below relied on a recent Colorado case, Hunter v. People, 655 P.2d 374 (Colo. 1982). In Hunter, the Colorado Supreme Court held that the admission of a statement to a private security guard without a prior hearing on its voluntariness violated due process. The prosecution argued that the defendant's confession to the security guard did not involve state action. However, the court in Hunter concluded that the prosecution's use of the statement at trial was state action. In reaching this holding, the Colorado Supreme Court cited only Townsend v. Sain, solely for its definition of an involuntary statement as one which is "not the product of a rational intellect and a free will." 655 P.2d at 376.

The Connelly court's decision on this point is supported by prior Colorado opinions. Colorado law has never required police misconduct as a prerequisite to a finding of involuntariness. In Martinez v. People, 55 Colo. 51, 132 P.64 (1913), the court ruled that a statement made by one asleep is not voluntary. In Read v. People, 122 Colo. 308, 221 P.2d 1070 (1950), the court reversed the Defendant's homicide conviction citing a series of physical and mental abuses by her husband during the previous twelve hours and stated:

> It is of no consequence how the condition was caused. Existing, it was sufficient to destroy the effect of the confessions as not being the product of a free and normal mind.

221 P.2d at 1077.

The decision below rested on an adequate and independant state ground. The Colorado Supreme Court did not feel "compelled by what it understood to be federal constitutional considerations to construe. . . its own law in the manner it did." Zacchini v. Scripts-Howard Broadcasting Co., 433 U.S. 562, 568 (1977).

II

THE COLORADO SUPREME COURT'S OPINION IS IN AGREEMENT WITH THIS COURT'S DECISIONS, AND IT IS CONSISTENT WITH CASE LAW FROM OTHER STATE COURTS.

Petitioner has asserted that the Colorado Supreme Court's opinion in Connelly conflicts with this Court's decisions on voluntariness. Petitioner argues that the state court has misinterpreted existing law, and implies that this Court's decisions require a finding of police coercion or misconduct before a statement can be ruled involuntary. The cases relied upon by Petitioner do not support this proposition, and one decision suggests the opposite conclusion.

The Colorado Supreme Court's analysis in Connelly is similar to that of this Court in Blackburn v. Alabama, 361 U.S. 199 (1960). In Blackburn the Court reversed the conviction of the defendant, diagnosed as a paranoid schizophrenic whose involuntary confession was used at trial. Conflicting expert testimony established that he "most probably" had been insane at the time of his confession. 361 U.S. at 203. Although the Court referred to the fact that the defendant had been interrogated for eight or nine hours in a small room, this fact was not the basis for the ruling that his confession was involuntary. In determining that use of the confession at trial violated due process of law, the Court focused rather on the conclu-

sion that it "most probably was not the product of any meaningful act of volition." 361 U.S. at 211. (Emphasis added). As the Court explained:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fasion. And when the other pertinent circumstances are considered - the eight-to-nine hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn - the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.

361 U.S. at 308-09. (Emphasis added). The description of police conduct is merely incidental to the Court's analysis in Blackburn.

The additional cases cited by Petitioner did involve police misconduct or coercion. However, whetner the absence of misconduct or coercion required a finding of voluntariness was not in issue in Townsend v. Sain and Culombe v. Connecticut. As this Court noted in Blackburn, the prohibition against the use of an involuntary confession at trial is not supported solely by prohibitions against coerced confession. "Thus a complex a values underlines the stricture against use by the state of confessions which . . . this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case." 361 U.S. at 207. As in Blackburn, the particular circumstances of this case indicate that Mr. Connelly's statements were not voluntary because of his mental illness. This case in even more compelling than Blackburn because the expert witness was unrebutted and unequivocally concluded that Mr. Connelly had not acted voluntarily.

Other portions of the Colorado Supreme Court's opinion in Connelly also are consistent with and supported by existing case law. The Connelly court relied in part upon Hunter v. People, 655 P.2d 374 (Colo. 1982), which held that the state action required for a violation of due process occurred when the state used the defendant's confession to a private citizen without a prior determination of its voluntariness. This Court has reached a similar conclusion. "This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the state within the meaning of the Fourteenth Amemdment." Cuyler v. Sullivan, 446 U.S. 335, 343 (1980).

The Colorado Supreme Court's conclusion that a confession can be excluded as involuntary although not elicited or coerced by police also is in accord with the decisions of other state courts. These state opinions hold that a confession to a private citizen must be voluntary to be admitted into evidence. E.g., State v. Christopher, 10 Ariz. App. 169, 457 P.2d 356 (1969); Peak v. State, 342 So.2d 98 (Fla. App. 1977); Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975), cert. denied, 425 U.S. 959 (1976); Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967); State v. Kelly, 61 N.J. 283, 294 A.2d 41 (1972); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

Mr. Connelly's statements were made while suffering command hallucinations as a result of chronic paronoid schizophrenia. The decision of the Colorado Supreme Court that they were involuntary and inadmissible is in accordance with the decisions of this Court and with the decisions of a variety of other state courts. The Colorado Supreme Court's opinion was not an extravagant extension of existing case law.

III

A DECISION OF THIS COURT ON THE MERITS WILL HAVE NO EFFECT ON THE CASE AGAINST MR. CONNELLY IN THE STATE COURT.

The Court's obligation to avoid rendering opinions only

advisory of federal rights, but not determinative of a case or controversy, warrants denial of the petition. Federal interference with this state court decision is not appropriate. A decision adverse to respondent here will not determine the outcome of this case.

The record reflects that Mr. Connelly approached Officer Anderson and stated that he had killed someone and wanted to tell the officer about it. Officer Anderson advised Mr. Connelly of his Miranda warnings, conducted a search for weapons and placed him in handcuffs. (Exhibit 2, pp. 7-11).

The Colorado Supreme Court concluded ". . . that the records of the suppression hearing adequately supports the court's determination that the Defendant's initial statement to Officer Anderson was not voluntarily made and that his statements subsequent to his arrest were not the result of a valid waiver of his Miranda rights." People v. Connelly, 702 P.2d at 729.

Petitioner in this case requests review of the state court's decision as to voluntariness only. "His later confession, which involves a Miranda issue, is not an issue in this petition." (State of Colorado's Petition for Writ of Certiorari, p. 15).

The only statement made by Mr. Connelly which is asked to be reviewed by this Court is his initial statement that he had killed someone and wanted to tell the officer about it. The Petitioner states in its petition that "the now excluded confession of the respondent permits him to walk free, because all the state's evidence is derivative from his initial confession to the previously unsolved murder." (Petition for Writ of Certiorari, pp. 17-18).

If the Petitioner were to prevail in this Court, the disposition of this case would not change. There exists no derivative evidence from Mr. Connelly's initial statement that he had killed someone and wanted to talk about it. No victim was identified. No method, location or individual was disclosed or could be discovered. No prosecution could take place based only on the information available from Respondent's initial statement.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

REPECTFULLY SUBMITTED

Robin Desmond
Deputy State Public Defender

Abelardo Perez Bernal Jr

Abelardo Perez Bernal, Jr.
A member of the Bar of this Court
Deputy State Public Defender

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CERTIFICATE OF SERVICE

I, Abelardo Perez Bernal, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Francis Barry Connelly, respondent herein, certify that on October 30, 1985, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on Ms. Brooke Wunnicke, Chief Appellate District Attorney, counsel for Petitioner, by depositing same in the United States Mail, postage prepaid, addressed as follows:

Ms. Brooke Wunnicke
Chief Appellate District Attorney

District Attorney's Office
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Abelardo Perez Bernal, Jr.

MOTION FILED
OCT 30 [redacted]

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THE STATE OF COLORADO,
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On Writ Of Certiorari To The Colorado Supreme Court

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

o

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The Colorado Attorney General and the states and territories of Alabama, Alaska, California, Connecticut, Delaware, Guam, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Virgin Islands, Virginia, Washington, and Wyoming, sponsored by their respective attorneys general, and the Colorado District Attorneys Council move for leave to file a brief in support of the petition for writ of certiorari for the following reasons:

1. Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, consent to file an amicus brief need not be had when the brief is presented for a state sponsored by its attorney general. The Office of the Clerk of the Supreme Court of the United States indicates that either consent or motion is required in this case because the Colorado Attorney General may not be considered the state sponsor where the state appears as a party in the caption and because one of the amici, the Colorado District Attorneys Council, is not within the provisions of Rule 36.4.

2. The amici have the consent of the petitioner Denver District Attorney, but the respondent through his counsel, the Colorado State Public Defender, refuses his consent.

3. The amici curiae have a substantial interest in seeing this holding reviewed because they are all officers or organizations of officers with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the prior holdings of this court and the fifth and fourteenth amendments of the United States Constitution, which are binding law on all of the amici curiae.

4. The brief of the amici curiae sets forth the questions of law raised by the Colorado Supreme Court opinion in a broader context than presented by the petitioner. More specifically, the amicus brief presents for review the Colorado court's finding of fifth amendment, as well as fourteenth amendment, violations in using the defendant's confessions, and it addresses the relationship between the two constitutional standards.

Wherefor, the amici curiae move for leave to file a brief in support of the petition for writ of certiorari.

FOR THE ATTORNEY GENERAL:

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Supreme Court, U.S.
FILED
OCT 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

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On Writ Of Certiorari To The Colorado Supreme Court

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BRIEF OF AMICI IN SUPPORT OF THE PETITION BY THE COLORADO ATTORNEY GENERAL AND THE TWENTY-SIX AMICI THAT APPEAR ON THE INSIDE COVER

o

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Indiana by Linley E. Pearson, Attorney General
Iowa by Thomas J. Miller, Attorney General
Kentucky by David L. Armstrong, Attorney General
Louisiana by William J. Guste, Jr., Attorney General
Michigan by Frank J. Kelley, Attorney General
Minnesota by Hubert H. Humphrey, III, Attorney General
Missouri by William L. Webster, Attorney General
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New Hampshire by Stephen E. Merrill, Attorney General
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Oregon by David Frohnmayer, Attorney General
Virgin Islands by Victor G. Schneider, Acting Attorney General
Virginia by William G. Broaddus, Attorney General
Washington by Kenneth O. Eikenberry, Attorney General
Wyoming by Archie G. McClintock, Attorney General
Colorado District Attorneys Council

QUESTIONS PRESENTED FOR REVIEW

1. Must a reliable and completely unsolicited confession of murder by someone not even known to or suspected by the police be suppressed as involuntary because the defendant believed that God told him to make it?

2. Does moral or psychological pressure to confess emanating from a source other than official coercion make ineffective a waiver of *Miranda* rights and require suppression of subsequent elaboration by the defendant after *Miranda* warnings?

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Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 U. Va. L. R. 859 (1979)

McCormick on Evidence, ch. 14 (E. Cleary 3 ed. 1984)

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The amici curiae have a substantial interest in seeing this holding reviewed because they are all officers or organizations of officers with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the prior holdings of this court and the fifth and fourteenth amendments of the United States Constitution, which are binding law on all of the amici curiae.

—o—

STATEMENT OF THE CASE

The defendant, Francis Connelly, was charged with second-degree murder in Denver. On interlocutory appeal by the Denver district attorney, the Colorado Supreme Court upheld suppression of the defendant's confession.

The defendant came up to a uniformed policeman in downtown Denver and said he had killed someone and wanted to tell the officer about it. After being warned of his rights, the defendant told the officer that he had killed a young girl he was traveling with in 1982. The officer called the Denver Police Department, which sent a detective who confirmed that a body had been found. The defendant then gave the name of the victim and showed how and where he committed the murder and disposed of the body.

A psychiatrist testified that the defendant experienced the voice of God telling him to go to Denver from Boston and confess or commit suicide. The doctor said that the defendant was suffering from chronic paranoid schizophrenia and his statements resulted from "command auditory hallucinations," which made him feel as if he had to do what the voice told him.

—o—

REASONS FOR ALLOWING THE WRIT

This court should issue its writ and review the holding of the Colorado Supreme Court because it has decided an important question of United States Constitutional law with far-reaching implications for the use of confessions in criminal trials, and it has done so in a way that by all indications would not be sanctioned by this court. The case presents a rare opportunity for review because its facts do not permit a narrow resolution of the questions presented. It rests precisely at a fork in the development of the law of confessions and demands a decision along major doctrinal lines that will likely clarify prior holdings as well as affect future development. The procedural posture of the case (appeal from pretrial suppression order) and the lack of factual dispute make it unlikely that the ultimate rule of decision would involve issues that are not already apparent.

The Colorado court's suppression of the initial, unsolicited confession stands squarely for the proposition that the "'old' due process voluntariness test," *see Oregon v. Elstad*, 105 S. Ct. 1285 (1985), requires suppression in some cases even though there are strong indications of reliability and the confession is not the result of any "police practices" whatsoever. While a "complex of values" underlie the strictures against use by the state of involuntary confessions, *Blackburn v. Alabama*, 361 U.S. 199 (1960), the ultimate goal of suppression is to insure against unfair or improper treatment by the police in extracting confessions. The context in which such terms as "rational intellect" and "free will" have been used, *see, e.g., Townsend v. Sain*, 372 U.S. 293 (1963), makes this clear. This court has never decided a case or controversy in which it found the use of an unsolicited confession to be a violation of due process.

In this unusual case Colorado holds that the due process clause of the fourteenth amendment prohibits the *use* at trial of a confession not "voluntarily" given, whether or not official coercion was involved in getting the confession. The Colorado court did not discuss the reasons why confessions made under moral or psychological pressure should be suppressed. Instead it shifted the inquiry from the *content* of the "complex of values" involved in the due process component of the voluntariness standard to the *applicability* of the fourteenth amendment. Rather than deciding whether use of the evidence at trial is the type of state action prohibited by the due process clause, it decided simply that use of the evidence at trial is sufficient state action to make the due process clause applicable.

After the defendant's initial confession he was warned of his *Miranda* rights. His further elaboration about the murder was suppressed for the reason that psychological pressure from within made his waiver of *Miranda* rights ineffective. The effects of this second holding are even broader than the first, involving a much larger class of confessions and touching upon the standard for waiver of a constitutional right generally.

Questions about violation of *Miranda* rights have been analyzed by this court in terms of the fifth amendment's privilege against compelled self-incrimination. Whether or not voluntary waiver of *Miranda* rights is anything other than making a voluntary confession, *see* McCormick on Evidence, sec. 153 (E. Cleary 3d ed. 1984), recent holdings of this court make clear that the fifth amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad, supra,* at 1291.

Despite the per se rules of exclusion adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966), the voluntariness standard has remained important in three situations: 1) where *Miranda* rights were not violated; 2) where statements are suppressed but might be used for impeachment of a testifying defendant; and (3) where statements are made in violation of *Miranda* but are subsequently made again after compliance with *Miranda*. *Oregon v. Elstad, supra*. Nevertheless, growth of the old voluntariness standard by this court has been stunted, if not brought to a complete standstill, by the parallel standards developed as a result of the holding of *Miranda*.

For years, lower courts and commentators have bemoaned the absence of any clear expression by this court of the relationship that was intended between the rights to be vindicated by the old voluntariness standard and the rights to be vindicated by the per se rules of exclusion of *Miranda*, asking whether they are the same or even whether the one is a subset of the other, and questioning whether due process should be addressed as a matter of voluntariness at all and, if so, whether the standard of due process should depend upon the strength of will of any particular individual. *See generally* Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865 (1981); Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 U. Va. L. R. 859 (1979); *McCormick on Evidence*, ch. 14 (E. Cleary 3d ed. 1984).

By suppressing a confession the reliability of which is not seriously questioned and which was clearly not extracted by police practices, and by doing so in reliance upon both the fifth and fourteenth amendments to the United States Constitution, the holding of the Colorado

court presents an opportunity to define the limits of the due process component of the "old" voluntariness standard and to clarify the relationship between that standard and constitutional rights guaranteed by *Miranda*. The case captures the interest of lawyers and nonlawyers alike because the conflict involved is so fundamental that it literally compels either a satisfactory articulation of the competing interest to be advanced by suppression or an admission that the time has come to narrow any rule of decision that could require suppression here.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

COLORADO *v.* FRANCIS BARRY CONNELLY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 85–660. Decided January 13, 1986

The motion of Duane Woodard, Attorney General of Colorado, et al., for leave to file a brief as *amici curiae* is granted. The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted. In addition to the question presented by the petition for writ of certiorari, the parties are requested to brief and argue the following question:

Did respondent's mental condition render his waiver of *Miranda* rights ineffective?

The application for stay, presented to JUSTICE WHITE and by him referred to the Court, is granted pending the issuance of the mandate of this Court.

MEMORANDUM of JUSTICE BRENNAN, with whom JUSTICE STEVENS joins.

This grant of certiorari is yet another instance supporting the concern that the Court shows an unseemly eagerness to act as "the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction . . . ." *Wainwright* v. *Witt*, —— U. S. ——, —— (1985) (BRENNAN, J., dissenting). Most often, this concern has been evoked by the Court's overly narrow interpretations of the Constitution's fundamental guarantees and the laws established to secure relief from violations of those guarantees. See *id.*; *United States* v. *Leon*, —— U. S. ——, —— (1984) (BRENNAN, J., dissenting). However, the Court's willingness to take special judicial action to assist the prosecutor has not been limited to its interpretations of substantive law. For example, in *New Jersey* v. *T. L. O.*, —— U. S. —— (1984), reargu-

ment was directed on a constitutional question not raised by either party because it provided a broader basis for upholding the State's action. Similarly, two Terms ago, JUSTICE STEVENS noted the "quite striking" fact that during the preceding two-and-a-half years the Court had summarily reversed, without briefing or oral argument, 19 criminal cases—every one on the petition of the warden or the prosecutor and every one in his favor. *Florida* v. *Myers*, —— U. S. ——, —— – ——, and n. 3 (1984) (STEVENS J., dissenting). Nothing has changed in the year-and-a-half since that decision, for, although in the immediate wake of JUSTICE STEVENS' dissent the Court did summarily reverse a few convictions on the petition of a criminal defendant, the trend to grant summary dispositions only in favor of the prosecutor has resumed and the record now stands at 26–4.[1] No particularly informed understanding of statistics is required to appreciate that the likelihood of courts so consistently erring

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[1]The four cases since *Florida* v. *Myers* decided in favor of a criminal defendant are: *Payne* v. *Virginia*, —— U. S. —— (1984) *(per curiam)*; *Thompson* v. *Louisiana*, —— U. S. —— (1984) *(per curiam)*; *Smith* v. *Illinois*, —— U. S. —— (1984) *(per curiam)*; and *Lanier* v. *South Carolina*, —— U. S. —— (1985) *(per curiam)*. The seven cases decided in favor of the warden or prosecutor during that same period are: *Massachusetts* v. *Upton*, —— U. S. —— (1984) *(per curiam)*; *Florida* v. *Rodriguez*, —— U. S. —— (1984) *(per curiam)*; *United States* v. *Woodward*, —— U. S. —— (1984) *(per curiam)*; *United States* v. *Gagnon*, —— U. S. —— (1985) *(per curiam)*; *United States* v. *Benchimol*, —— U. S. —— (1985) *(per curiam)*; *Delaware* v. *Fensterer*, —— U. S. —— (1985) *(per curiam)*; and *Pennsylvania* v. *Goldhammer*, —— U. S. —— (1985) *(per curiam)*. *Payne*, *Thompson*, and *Smith* followed closely after JUSTICE STEVENS' dissent in *Florida* v. *Myers*. Since *Smith* was decided on December 10, 1984, however, five of the last six summary dispositions have been in favor of the State.

I am not suggesting that all the summary judgments awarded to the State were incorrect or improper, although I did not agree with the result in many of the cases. It is the Court's selective employment of its summary disposition power only in favor of the State that is most disturbing.

in favor of defendants is truly remote and that only a one-sided exercise of discretion can explain these results.

The Court's treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. Today, the Court takes the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him to seek reversal on a ground he did not present himself.[2]

Respondent approached a uniformed police officer and stated that "he had killed someone" and wanted to tell the officer about it. Before questioning respondent about the killing, the officer informed respondent of his *Miranda* rights. Respondent waived his rights and proceeded to confess to the murder of a young girl. After being charged with murder, respondent moved to suppress his statements as made involuntarily. A psychiatrist testified that respondent believed that the voice of God had commanded him to confess or commit suicide. The psychiatrist testified that respondent was suffering from "chronic paranoid schizophrenia" and "command auditory hallucinations" when he confessed and that respondent's actions were not the product of a free will. The trial court suppressed statements made both before and after the *Miranda* warnings were given on the ground that respondent's mental state rendered these confessions involuntary and tainted his waiver of the *Miranda* rights. The Colorado Supreme Court affirmed, and this petition followed. The prosecutor carefully limited his petition to this Court to challenge only the suppression of respondent's initial, unsolicited statements. The petition expressly states that "[respondent's] later confession, which involves a *Miranda* issue, is not an issue in this petition." Pet. for Cert. 15.

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[2] This action is even less justifiable than the improper decision to order reargument in *New Jersey* v. *T. L. O.*, *supra*, since here the Court cannot even point to having heard oral argument as justification for revising the issues presented to suit its own desires.

Despite this, the Court directs the parties to brief and argue that issue.

We do not know why the prosecutor chose not to seek review of the *Miranda* issue. But, whatever the reason, review was *not* sought, and it is hardly for this Court to "second chair" the prosecutor to alter his strategy or guard him from mistakes. Under our Rule 21.1(a), "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Given petitioner's express disclaimer that the *Miranda* issue is presented, that question obviously is not "fairly included" in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim. In asking the parties to address issues that the State chose not to present in the petition for certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm of the prosecution.[1]

I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen—guilty or innocent—is treated fairly and accorded dignity and respect by the State. Of course, the Framers could not foresee the shape our society would take as the nation developed. Nor could they foresee how the po-

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[1] I express no views about the merits of the issues on which certiorari is now granted. See *Ohio ex rel. Eaton* v. *Price*, 360 U. S. 246 (1959) (statement of BRENNAN, J.).

lice function would evolve to keep pace. Rather, it has fallen to this Court—the "ultimate interpreter of the Constitution," *Baker* v. *Carr*, 369 U. S. 186, 211 (1962)—to enforce the rights enshrined in the Bill of Rights and preserve the principles established in 1789. Ours is the duty to prevent encroachment on these principles by over-zealous police in the discharge of their great responsibility to prevent crime. Every law-abiding citizen shares with the Court the belief that the prevention of crime is an essential governmental function. However, the members of this Court have the special responsibility to recognize that, as essential as is the goal of preventing crime, "the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." *Florida* v. *Myers*, —— U. S., at —— (STEVENS, J., dissenting). This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us. I can only repeat: "One can only hope that this day too will soon pass." *Wainwright* v. *Witt*, —— U. S., at —— (BRENNAN, J., dissenting).

Supreme Court, U.S.
FILED
MAR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-660

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

JOINT APPENDIX

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CERTIORARI GRANTED JANUARY 13, 1986

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NOTE:

The Opinion of the Colorado Supreme Court appealed from here, People v. Connelly, 702 P.2d 722, appears as Exhibit A to the Petition for Writ of Certiorari and is not reproduced here.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

DATE	PROCEEDINGS
8-31-83	Information filed in Denver District Court
9-1-83	Defendant remanded to Colorado State Hospital for competency examination
10-14-83	Court finds defendant incompetent to proceed
3-7-84	Defendant deemed restored to competency
5-25-84	Hearing on defendant's motion to suppress statements and order suppressing statements and derivative evidence
6-5-84	Notice of Interlocutory Appeal filed
	COLORADO SUPREME COURT
7-8-85	Decision reported by Colorado Supreme Court
7-9-85	Remittitur to trial court
7-19-85	Motion to withdraw remittitur denied

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing in the Denver District Court on May 25, 1984.

Testimony of Officer Anderson [p.6, l.20 - p. 18, l.13]

DIRECT EXAMINATION BY MR. JOHNSON:

Q Sir, would you state your full name and spell your last name for the record?

A Patrick Robert Anderson,

A-n-d-e-r-s-o-n.

Q How are you employed?

A Police officer for the City and County of Denver.

Q How long have you been so employed?

A Since August of 1979.

Q Sir, I want to direct your attention back to August 18 of 1983; were you so employed and on duty on that date?

A I was so employed on that date, yes, sir.

Q Directing your attention to the morning hours of that date, were you on duty?

A I was off duty.

Q Were you in fact working?

A I was working in an off-duty capacity, yes, sir.

Q Where was that?

A That was in the 1600 Block of Court Place.

Q Was that within the City and County of Denver, State of Colorado on that date?

A Yes, sir, it was and it is.

Q Did anything unusual happen at that time or at that location?

A Yes, sir.

Q What was that?

A A party approached me while I was standing on the street and stated to me

that he had killed someone and wanted to tell me about it.

Q Now, at the time that this party approached you, how were you dressed?

A I was dressed in full police uniform.

Q Would that be the same type of uniform you have on today in court?

A Yes, sir, the same uniform.

Q Badge and nameplate and the works?

A The works, yes, sir.

Q Did you have your hat on?

A Yes, sir, I did.

Q At the time this party approached you and told you he wanted to tell you about a murder, what was your response?

A At first, I thought he was some sort of a crackpot, to be honest.

* * *

Q (By Mr. Johnson) Officer Anderson, you say you thought he was a crackpot; was he doing anything which made you think that?

A No, but a lot of people come up to police officers and tell them things that usually they are sometimes under the influence of drugs or alcohol or some type of thing like that.

* * *

Q And what occurred next?

A I noticed that his manner of dress and his demeanor didn't coincide with my feelings that he might be mentally unstable or anything like that or under the influence of alcohol or drugs, and ---

Q How do you mean, not coincide, sir?

A Well, he was upright, he was dressed clean, neat. His hair was combed, clean pants, clean jacket.

* * *

Q Based on his statement and your observations, did you take any action?

A Yes, sir, I did.

Q What did you do?

A I advised the party of his Miranda warnings.

Q What advisement is that?

A The advisement that he has a right to remain silent, that anything he says can and will be used against him in a court of law, that he has a right to an attorney and have him present during questioning, and if he cannot afford an attorney, one will be appointed for him before questioning.

Q Did you ask him if he understood those rights?

A Yes, I did.

Q Did he respond?

A Yes, sir, he said that he did.

Q After you had advised Mr. Connelly what did you do next?

A For my own safety, I conducted a cursory search for any weapons and placed the party in handcuffs.

* * *

Q (By Mr. Johnson) After you had called Detective Antuna, would you tell us what happened next between yourself and Mr. Connelly?

A As I was waiting for Detective Antuna to respond, I again advised Mr. Connelly that he did not have to talk to me, and I asked him if he had been drinking, and he stated, no, and he also stated no to the fact that I asked him if he had been using drugs, and he again, like I say, replied no. I asked him if he had ever been treated for any mental disorders, and he stated that he had been in several different hospitals. I believe in my statement I put in how many. I don't recall.

Q What was your purpose in asking him if he had ever been in any mental hospitals?

A Just to more make myself feel more like I -- that I wasn't dealing with anybody who was mentally unstable or anything like that.

Q Was there anything in the actions or words of Mr. Connelly that made you feel that he had in fact been in a mental institution?

A I just really can't elaborate. My own personal feeling is that he might have been, yes. I can't elaborate as to why.

* * *

Q During this time, while you were waiting for Detective Antuna, did you threaten Mr. Connelly or promise him anything or use any duress or do anything to elicit any statements from him?

A No, sir.

Q Other than questioning?

A Other than questioning, right.

* * *

CROSS-EXAMINATION BY MR. BERNAL:

* * *

Q In your statement, you indicated on page 1 of your statement that his speech was clear and unwavering [sic]?

A Yes, sir.

Q And yet on page 2 you indicate that you had asked him if he had been drinking or taking drugs, and he indicated no, and that you also asked him if he had received any treatment for any mental disorders, and he indicated yes?

A That's correct.

Q And isn't it also a fact on your statement you also indicated that he told you he had been treated in five different hospitals?

A I believe that's correct; yes.

* * *

Q After he indicated to you that he had been treated in five different mental

details regarding his treatment beyond that point, did you?

A I didn't ask him anything else about his treatment, no, sir.

* * *

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing in the Denver District Court on May 25, 1984.

Testimony of Detective Antuna [p.23, l.16 - p.27, l.2]

DIRECT EXAMINATION BY MR. JOHNSON:

* * *

Q Now, at some point, did you have an opportunity to talk to Mr. Connelly?

A Yes, I did.

Q Would you relate how that occurred and what the substance of that conversation was, verbatim if you can do that, but if not, the substance?

A Okay, I could do it just the substance of the conversation. Once I talked to Officer Anderson and gathered the information that he had that was related to him by Mr. Connelly, I requested that

they take the handcuffs off Mr. Connelly. At that time, I placed Mr. Connelly in my police car, and both officers were off duty, so you know, I felt that they should probably get back to their jobs, so I let them go at that point and advised Mr. Connelly of his rights, verbally advised him of his Miranda rights in the police car, and basically just asked him, you know, to tell me what he had on his mind.

* * *

Q When you asked him to tell you what was on his mind, did he respond to you?

A Yes, he did.

Q What did he say?

A In essence, he told me that he had come back to Denver and that he had wanted to confess to a murder of a young Indian female.

* * *

Q When he told you this information, did that ring any bells in your mind about any current homicides in Denver?

A Not to me, no.

Q Did you have any further discussions with Mr. Connelly?

A Yes, I did.

Q What were the nature of those, please?

A Transported him down to Denver Police headquarters from the Court Street address, and there I contacted Sergeant Thomas Haney and informed him as to what Mr. Connelly had told me. Sergeant Haney was more familiar with the total group of homicides that we handle in Denver and began checking some records.

Q Was that check fruitful in turning up anything?

A Well, he had come up with a female, an unidentified female that her body was discovered I believe in April of 1983, and

we had no identification on her whatsoever, so along with Sergeant Haney and I, we sat down in Sergeant Haney's office and began to get some more information from Mr. Connelly.

Q Could you relate, please, the nature of the office? Was it a small office, large office? Did it have windows, that sort of thing?

A Yes. One whole wall is windows. The office size is probably 15 by 10 feet roughly. It's got a desk and chairs, and you know, just a business office is what it amounts to.

Q Were there any other persons in the room besides yourself, Mr. Connelly and Sergeant Haney?

A No, there was not.

Q Was the door open or closed, do you remember?

A I don't remember.

Q And what was the nature of the questioning? Did you ask questions, then Sergeant Haney, or how did that occur?

A I think I recall I just basically asked Mr. Connelly to tell Sergeant Haney what he told me in the car, and at that point, Mr. Connelly openly told Sergeant Haney the same thing.

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Excerpts from Reporter's Transcript of Suppression Hearing on May 25, 1984.

Testimony of Dr. Metzner

[p.46, l.21 - p.70, l.16]

MR. BERNAL: Your Honor, I would call Dr. Metzner to the stand.

THE COURT: Doctor, please step forward.

* * *

THE COURT: I will just take notice of the report dictated September 22, typed September 22, received by the Court October 14, and then the other matter was dated in a letter on Dr. Metzner's letterhead February 29, 1984.

MR. BERNAL: Those are the only two reports I will be addressing in my testimony through Dr. Metzner.

THE COURT: Mr. Johnson, do you have any objections to the doctor testifying as an

expert in the field of forensic psychiatry?

MR. JOHNSON: No, Your Honor.

THE COURT: The doctor will be received as an expert in the field of forensic psychiatry.

JEFFREY METZNER was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BERNAL:

* * *

Q Would you please look at the individual at the end of Defense Counsel table and state if you recognize that person.

A Yes, that's Mr. Connelly.

Q Were you called upon by this Court to do an evaluation of Mr. Connelly?

A Yes, I was.

* * *

Q (By Mr. Bernal) Briefly, the history of the confession ---

A The history of the confession, Mr. Connelly told me that during August 17, during the late afternoon, he began experiencing God's voice telling him to go to Denver and confess the alleged crime to a policeman, and he began acting on those thoughts, and by 6:00 or 8:00 p.m. he had taken, withdrawn some money from the bank and had taken a plane from Denver -- from Boston to Denver. He then described arriving in Denver, spending the night basically walking around town, looking for the scene of the alleged crime. He eventually located it, said he was able to locate it with the help of the voices that he was hearing, and that the following morning the voices told him to go check in in a hotel or motel, and he found a place near the airport. It was around this time that the voices began telling him that he should go confess, and he described being

extremely ambivalent about this, going from the hotel to the airport anywhere from three to five different times, with the intent of wanting to go back to Boston.

Finally, the voice, this voice he consistently described as being God's voice, telling him that he had to confess, that he really had two choices. He could either confess or he could kill himself, and he mentioned prior to this time he felt that he had some choice in whether to confess or not. Once the voice changed the content, he felt that he didn't have much of a choice. The voice told him to go get a razor blade to kill himself. He made it quite clear he did not want to kill himself, and the other option he saw was to confess, and that's when the voice told him to do a number of things at that time, such as send money back home to his

mother because he wasn't going to need that ---

Q Let me interrupt you there for a moment. You indicated prior when we had met prior to this hearing a concern about whether he was telling the truth as to the money that had been sent. Why did you have a concern about whether he in fact had sent the money?

A The reason I had that concern is a lot of my opinion is based in great part on what he told me, and so the reliability of what he's telling me has significant impact on what my opinion is, so if he told me that he sent some money and that later proved not to be true, then I at the very least have to reconsider how that fit into my assessment of him.

Q Then prior to preparing this report my office furnished you a copy of all discovery?

A That's correct.

Q Did you find anything in the discovery to indicate to you that Francis was telling the truth?

A Yes. In -- and I believe it's one of the police reports, I think one of the officers went to Boston to interview various people, and in one of those reports it indicates that either mother or sister did receive a little over $400 in the mail shortly after his arrival in Denver.

Q Was that the time that Detective Haynes was in Boston?

A I believe so.

Q And you are referring to $403 received in an envelope postmarked August 18?

A That's correct.

Q After you found out that the police had that information, what did that do to

affect Mr. Connelly's credibility in speaking with you?

A That would indicate to me that the reliability of the history was fairly good.

Q Okay, please continue then. You indicated -- I stopped you at the point of sending the $400 home.

A That God told him to do a number of things including sending the money home. He also wanted to send his key to his motorcycle home, and tells me that God told him he didn't have time to do that.

He then eventually made it to downtown Denver, and I think he took -- I think it was a bus, as I recall, and first policeman he came up to he made the confession, and some other pertinent comments. I talked with him, he then went into who God was and what he essentially said was God was really his father, and

referring to his deceased biological father, and that that then made him Jesus Christ, and then he went into a rather elaborate delusional system of what that meant to him.

Mr. Connelly was unable to describe what went on during his statements to the police, essentially reported to me that he felt confused about being asked a lot of questions but also being -- feeling quite upset once he eventually got to the scene of the alleged crime.

Q What is the exact problem that Francis has?

A Francis has a lot of problems, but I think the relevant problem is that Mr. Connelly suffers from a significant mental disorder that is called chronic schizophrenia. This is an illness which is characterized by various psychotic episodes. Let me speak some English.

Psychosis is a form of a mental disorder that's characterized frequently by significant personality disorganization, often bizarre behavior, withdrawn behavior, difficulty being in contact with reality, and also frequently is associated with auditory or visual hallucinations. That's what I mean by psychosis.

Schizophrenia is a chronic illness that often is manifested by psychoses. Mr. Connelly demonstrated to me the following symptoms of a schizophrenic disorder. He has experienced intermittently on a fairly chronic basis auditory hallucinations; that is, hearing voices that are not really there. He has also experienced less frequently visual hallucinations, that is, seeing things that aren't really there.

I think what's particularly important here is the type of auditory hallucinations he experienced. I think he has intermittently experienced what is called command hallucinations. What a command hallucination is, it's a type of hallucination in which the person experiencing it feels as if they have to act on whatever the voice is telling them. Most people with schizophrenia do not experience command hallucinations. From what Mr. Connelly described to me, that was pretty consistent in my mind with a command hallucination, and that really affects his volitional abilities; that is, his ability to make free and rational choices. I think that his illness did not significantly impair his cognitive abilities, and what I mean when I say that, it would be my belief for example that when he was read his Miranda rights,

he probably had the capacity to know that he was being read his Miranda rights, and he had certain rights, but whether that -- I think he wasn't able to use that information because of the command hallucinations that he had experienced.

Q My next question being, if you had an opinion as to whether he voluntarily spoke to the police --

A It's my -- and again, it's clearly dependent upon what your definition of voluntary is. I don't think that he was able to make a free and intelligent decision in making that statement based on impairment by his chronic schizophrenia.

Q Do you believe that at the time -- strike that.

How do you know that he was feeling those problems at the time that he made the confession? How do we know that he wasn't a lot worse when he spoke to you,

but when he talked to the police he was probably okay?

A Let me tell you how I went into my differential diagnosis. One possibility is that at the time of the confession, he was not psychotic, and that he was now lying to me and making this up. That's certainly one possibility, and that's what was inconsistent with that was, one, he was admitted to Ward 18 at Denver General Hospital on August 23d in a very psychotic state. It's still possible that he wasn't psychotic at the time, and this was in reaction to the legal situation that he was in. It's my opinion, though, that what he told me, I didn't have doubts. I didn't have significant doubts about the reliability of his history. That is a lot of people could have told me some of the things he said, but there's a certain flavor, a certain manner of telling you

that which based on mainly your clinical experience whether you believe him or not, plus I had some outside confirmation, and I haven't found anything in his history that he has told me that has been inaccurate, and sources that I have used to confirm his history include getting records from previous hospitalizations, as well as reviewing police reports, as well as the hospital staff, so the answer is it is certainly possible that he wasn't psychotic at the time of the confession; it's my opinion based on my examination, however, that he was psychotic.

Q He signed a waiver of rights; what affect in your opinion would that signature have coming from Francis Connelly in that he signed the waiver of rights?

A What affect would it have on what?

Q His perception at that time. Is there a relationship between the voluntariness in his mind and the signature that he had on the advisement?

A It's my opinion that Mr. Connelly felt that he didn't have a choice about making a confession. It was not just that his instructions from God and not just instructions, it was that his command from God was that, you go tell the police, and you tell them everything that happened, and you don't have a choice, and if you have to sign things, you sign things, but you have to tell them, and that's what he -- in my opinion is what he was acting on.

* * *

Q Doctor, you were present in court when you heard Detective Antuna and Officer Anderson talk about the mental state of Francis Connelly, and you also heard Detective Antuna agree that his belief is

that Francis Connelly was normal or appeared to be normal.

A Yes.

Q How is it that a lay eye cannot really pick up what really is wrong with an individual?

A Well, in general, psychoses can take a variety of forms. The common or lay perception of psychosis is when people that anyone after one minute of interaction will say that they are bonkers or crazy, and the vast majority of people who are psychotic, it's very obvious to anyone within a small period of time that's the case, and they're pretty disorganized. Now, psychoses can take other forms. For example, someone could have what's called a paranoid delusional belief such as that the CIA is following me, and if there's no basis to reality to that, that's a psychotic belief, and they

may be very functioning in all other aspects of their life, and if you never ask them questions that would elicit that information, you would think they were pretty normal.

I think in similar ways, what went on with Mr. Connelly is Mr. Connelly clearly was very organized in a number of different fashions. He was able to withdraw money from a bank, buy a ticket to come to Denver, find a policeman, give him all this information. That's pretty organized, and to most people it doesn't look like anything crazy about that. The question is, then, if you ask him, get into, why are you telling me this, and if you believe what he is saying, if you believe that he was experiencing auditory hallucinations, that's pretty psychotic.

Now, you're not going to know about that in general unless you specifically

ask that question, and if you don't ask the question and it's not particularly relevant, then you may not think there's anything particularly abnormal about the individual.

* * *

CROSS-EXAMINATION BY MR. JOHNSON:

Q Good afternoon, Dr. Metzner.

A Good afternoon.

Q Doctor, you said that Mr. Connelly was experiencing God's voice; is that the way he related to you as God's voice?

A That's correct.

Q Could that be called conscience?

A I don't think it -- I don't think that's what he predominantly was experiencing. I think it's if you want to look at it from a psychodynamic viewpoint, I think it's quite likely that he was feeling pretty guilty about what was happening, but -- and that may have been a

part of it, but I don't think the voices he was hearing was his conscience.

Q The voices themselves, but they could have been -- I have forgotten the term used in here, but generated from within as opposed to being external, perhaps by conscience?

A Before I completely answer your question, maybe it would be helpful if you can define again for me what you mean by conscience.

Q What I mean by conscience?

A Uh-huh.

Q I had a professor ask me once in philosophy class and I couldn't do it then. I'm really referring to the fact of -- and I'm not sure if it's in your report or the other doctor's, if I could have just a moment ---

A To help clarify, if what you are asking me was he feeling guilty and was that the

prime reason he made the confession, again, that's a possibility. My opinion is that that was not the prime reason that he made a confession. It was because he was psychotic at the time. Part of his psychosis, I'm sure, is related to him feeling guilty.

* * *

Q The command hallucinations that you talked about affect volitional ability, but not cognitive?

A In Mr. Connelly's case, it was my opinion that it affected his volitional ability.

Q And as far as his cognitive is concerned and based upon the historical data related to you and which was subsequently proved, would you say specifically Mr. Connelly has the ability to relate accurately those cognitive facts, historical data?

A Now?

Q At that time.

A I thought during both times, all four times I was talking to him that he could. The reason I found him incompetent during the first time was it seemed pretty clear at the time that he was coming in and out of psychoses, so I wasn't very confident that he could consistently relate accurate information. By my February exam, I felt confident enough that he was now able to do it consistently.

Q And at the time of the statement on August 18, he could have been at that time as well?

A Yes.

Q As to the volitional end of it, he was being ordered to kill himself, is that right, by the voices in the alternative?

A Yes.

Q He did not choose to kill himself?

A That's correct.

Q He then perhaps could have not chosen to sign the advisement as well?

A He certainly could have chosen not to, and again, you have to weigh the areas of stress and how that affects his decision, but yeah, he could have chosen not to.

Q It was your opinion that he did not choose?

A It was my opinion that he really didn't have much of a choice.

PEOPLE V. CONNELLY
DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Ruling of the Denver District Court on May 25, 1985. [Reporter's Transcript pp.83-91]

JUDGE'S RULING

THE COURT: The Court finds as facts in this case that the Defendant on August 18 of 1983 contacted Officer Anderson of the Denver Police Department in the 1600 Block of Court Place and advised him that he had killed someone and wanted to talk about it to the police. Officer Anderson was in uniform at the time. The officer accurately advised the Defendant of his Miranda rights, asked if he understood those rights; the Defendant stated yes. Defendant was searched and cuffed, and the Defendant further stated that he had killed a girl in approximately November of 1982 in the general vicinity of West

Mississippi, that they were traveling companions.

The Detective called Detective Antuna, and the detective went to the scene, placed the Defendant in his vehicle, uncuffed him and released the police officers.

During the time Officer Anderson was speaking to the Defendant, the officer noted that the Defendant was neatly dressed and groomed, that he had clear and unwaivering speech, and there was nothing in his manner which he could state for us or define for us that gave him the impression the Defendant was not acting as a sane and rational person except that he did have a feeling, a feeling that he cannot define, that the Defendant was not acting normally. Officer Anderson used no threats, force, coercion or tricks to get

the information that was given to him by the Defendant.

Detective Antuna continued conversing with the Defendant. He was verbally advised of his rights, no promises or inducements were made to him, no threats were used, and the Defendant indicated that he had come back to Denver from Boston, or that he had come to Denver from Boston with a young Indian girl named Mary Ann Junta. The Defendant was taken to headquarters, records were checked, found that an unidentified female had been killed. The Detective along with the sergeant in the Homicide Detail asked the Defendant further questions, and he responded openly toward both of the officers.

The Defendant was asked if he would take the officers to the location of the homicide, and he agreed to do this. They

went to the scene. The Defendant found the location. As he got to the location, he got out of the car, walked directly to the rear of a building, became visible [sic] upset, stated that he was frightened, he walked into the storage room and indicated that this was where the homicide had taken place. No suggestions were made by the officers, no directions were given by the officers to find the place. They just followed merely the instructions given to them by the Defendant.

Detective Antuna testified that he didn't think that the Defendant had any kind of mental problems, that he was perfectly sane, and still feels based on his contact with the Defendant that he was sane. He admits that he has no specific training in the area, but the officer obviously comes in contact with a great

number of people in his job who are somewhat less than sane. I'm sure, at the time the officer meets them, but in his experience even he did not feel that the Defendant was ill in any manner. The Defendant answered questions appropriately. He was oriented at least as to place, and there was nothing in the contact of the -- or the conduct of the police officers involved that in any way would be considered by the Court to be overbearing or coercive.

The Court also finds that in the early morning hours of August 19 of 1983, the Defendant had become very disoriented. He had been in custody all this time. He talked with his Public Defenders and their investigator. He was not answering questions appropriately. He began at that point then discussing how voices had told him to come to Denver and that he followed

the directions of these voices and that he ultimately confessed.

Dr. Metzner was asked by the state hospital after the Court had sent the Defendant to the hospital for evaluation to evaluate the Defendant. The doctor's reports are in the court file. The Court will incorporate those into the facts here.

The ultimate decision of the doctor is that the Defendant was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17 of 1983 when he was told in his mind by God to go to Denver and to tell the police everything about this. The Defendant withdrew money from the bank, secured a plane ticket to Denver, came to Denver, was compelled by the voice of God to seek out and find the location of the homicide and then he went to a hotel to rest.

God's voice became stronger in the sense that the Defendant was given alternatives because he wanted to go back and did in fact go back to the airport on a number of occasions so that he could go back to Boston, but when he did that, he was told that he had only two choices, one of which was not to go back to Boston, the only two being he had to either kill himself or to confess. In exercising his options, the Defendant chose to confess to the police, sought out Officer Anderson as he did and ultimately confessed.

Prior to confessing, he sent his last money home to his mom as he had been directed by God in his mind.

From this, the Court concludes legally that there was nothing untoward in what the police did in receiving and recording the Defendant's comments to them. The burden is upon the Prosecution

first by a preponderance to prove that the statement made -- statements made to the police were made voluntarily. The Court does not need to decide whether or not legally the Defendant was insane at the time of the statements being made, only must find whether or not the Prosecution has proved by a preponderance of the evidence that he was voluntarily giving those statements.

The Court has reviewed the Fish case cited in the brief, also the Raffaelli case. Prior to the hearing, I looked at the Thorpe case and the Pinada case, all mentioned in the District Attorney's brief. I did not look at the Columbe [sic] and Townsend US Supreme Court cases cited in the brief, and I was aware of but I did not look at the Bookman case. The District Attorney makes two arguments to show that in fact by a preponderance of

the evidence that the statements made were voluntary. First of all, by analogy, the District Attorney argues that this statement is basically like the hearsay exception to the Rules of Evidence, and that is that, golly, this is a truthful statement, it was accurate and for that reason it should be admitted, but primarily the argument is made that this is a product of the Defendant's mind, a cognitive choice between the two options he had, the matter is basically accurate, so therefore, the confession should be admitted.

In conjunction with this, they argue that the State -- there was no State action to punish by suppression. The Court is not really suppressing matters here, though. The Townsend case and the Columbe [sic] case cited at page 4 of the brief are very accurate statements and

very old statements of law. These are made in 1961 and 1962. The essence of the admission of the confession is based upon in the Court's estimation and by these cases the fact that there is an element of self-direction in the giving of the statements. I believe this is an overflow of the basic Judeo-Christian ethic of self-determination and free will.

The Townsend language quoted for the Court in the District Attorney's brief is very definitive in this regard. "If an individual's will was overborne or if his confession was not the product of his of a rational intellect and a free will, his confession is inadmissible because coerced." There's no element there, and there's none in the Columbe [sic] quote that's cited which indicates that there has to be something done by the police in order to make the confession involuntary.

Here, in the Court's estimation, there's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner which is not unusual for people who suffer schizophrenia. He was able to do so so that trained, experienced police officers were not able to discern the mental difficulty that the Defendant was having.

The Court feels that with the overwhelming evidence presented by the Defense, that if I must balance this by a

preponderance of the evidence that the Prosecution just cannot meet that burden and did not meet that burden under these circumstances. In judging all of the circumstances then, as required by the Fish and Thorpe cases, the Court feels that the People have not met their burden by a preponderance of the evidence to show that the statement was voluntary.

In addition, the People would have to show if we even would get that far by a standard of clear and convincing evidence that the Defendant waived his right to counsel and his right to self-incrimination, and the Court cannot find by that standard being even a more difficult standard for the Prosecution that he did waive his right to counsel and his right to self-incrimination voluntarily, knowingly and intelligently; rather, he would sign anything, he would

do anything to follow the mandate of God to confess because his only alternative was to kill himself, and he did not choose to do that, both alternatives, however, being a figment of his imagination and a very definite product of his psychosis.

The Court feels, therefore, that the confession and all statements made to the police and all directions given by the Defendant in finding and locating the scene of the crime must be -- may not be presented as evidence, not necessarily that they are suppressed, merely under the language of the Columbe [sic] case this confession or its admissibility would offend due process, and therefore, the Court will not permit the District Attorney to present any evidence concerning the Defendant's statements to the police after he contacted them on August 18 of 1983.

MR. JOHNSON: Your Honor, the People understand the Court's ruling. At this point, we would ask for one point of clarification. What is the Court's ruling as to derivative use, things derived from the statement by the police department? Would any of those be admissible?

THE COURT: But for the Defendant's statements to the police, the police could not have developed any other, and had not developed any evidence linking the Defendant to the crime. I don't know, but I would guess that the police have more evidence at hand than Paragraphs 1, 2, 3 and 4 of the Defendant's motion to suppress would indicate. I'm sure there was more physical evidence and things like that, maybe not, but anything obtained prior to August 18 would certainly be admissible. Anything subsequent to August 18 the Court would feel would be directly

related to the Defendant's statements to the police and then therefore must under the fruit of the poisonous tree doctrine be excluded also.

SUPREME COURT OF THE UNITED STATES

COLORADO v. FRANCIS BARRY CONNELLY

On Petition For Writ Of Certiorari To The Supreme Court of Colorado

No.85-660. Decided January 13, 1986

The motion of Duane Woodard, Attorney General of Colorado, et al., for leave to file a brief as amici curiae is granted. The motion of respondent for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. In addition to the question presented by the petition for writ of certiorari, the parties are requested to brief and argue the following question:

Did respondent's mental condition render his waiver of Miranda rights ineffective?

The application for stay, presented to JUSTICE WHITE and by him referred to the

Court, is granted pending the issuance of the mandate of this Court.

MEMORANDUM OF JUSTICE BRENNAN, with whom JUSTICE STEVENS joins.

This grant of certiorari is yet another instance supporting the concern that the Court shows an unseemly eagerness to act as "the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction...." Wainwright v. Witt, ___U.S.___, ___(1985)(BRENNAN, J., dissenting). Most often, this concern has been evoked by the Court's overly narrow interpretations of the Constitution's fundamental guarantees and the laws established to secure relief from violations of those guarantees. See id.; United States v. Leon, ___U.S.___, ___(1984)(BRENNAN, J., dissenting). However, the Court's willingness to take

special judicial action to assist the prosecutor has not been limited to its interpretations of substantive law. For example, in New Jersey v. T.L.O., ___U.S.___(1984), reargument was directed on a constitutional question not raised by either party because it provided a broader basis for upholding the State's action. Similarly, two Terms ago, JUSTICE STEVENS noted the "quite striking" fact that during the preceding two-and-a-half years the Court had summarily reversed, without briefing or oral argument, 19 criminal cases -- every one on the petition of the warden or the prosecutor and every one in his favor. Florida v. Myers, ___U.S.___, ___ _ ___, and n. 3 (1984)(STEVENS J., dissenting). Nothing has changed in the year-and-a-half since that decision, for, although in the immediate wake of JUSTICE STEVENS' dissent the Court did summarily

reverse a few convictions on the petition of a criminal defendant, the trend to grant summary dispositions only in favor of the prosecutor has resumed and the record now stands at 26-4.[1] No

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[1]The four cases since Florida v. Myers decided in favor of a criminal defendant are: Payne v. Virginia, ___U.S.___(1984)(per curiam); Thompson v. Louisiana, ___U.S.___(1984)(per curiam); Smith v. Illinois, ___U.S.___(1984)(per curiam); and Lanier v. South Carolina, ___U.S.___(1985)(per curiam). The seven cases decided in favor of the warden or prosecutor during that same period are: Massachusetts v. Upton, ___U.S.___(1984)(per curiam); Florida v. Rodriguez, ___U.S.___(1984)(per curiam); United States v. Woodward, ___U.S.___(1984)(per curiam); United States v. Gagnon, ___U.S.___(1985)(per curiam); United States v. Benchimol, ___U.S.___(1985)(per curiam); Delaware v. Fensterer, ___U.S.___(1985)(per curiam); and Pennsylvania v. Goldhammer, ___U.S.___(1985)(per curiam). Payne, Thompson, and Smith followed closely after JUSTICE STEVENS' dissent in Florida v. Myers. Since Smith was decided on December 10, 1984, however, five of the last six summary dispositions have been in favor of the State.

(Footnote Continued)

particularly informed understanding of statistics is required to appreciate that the likelihood of courts so consistently erring in favor of defendants is truly remote and that only a one-sided exercise of discretion can explain these results.

The Court's treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. Today, the Court takes the unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him

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(Footnote Continued)
I am not suggesting that all the summary judgments awarded to the State were incorrect or improper, although I did not agree with the result in many of the cases. It is the Court's selective employment of its summary disposition power only in favor of the State that is most disturbing.

to seek reversal on a ground he did not present himself.[2]

Respondent approached a uniformed police officer and stated that "he had killed someone" and wanted to tell the officer about it. Before questioning respondent about the killing, the officer informed respondent of his Miranda rights. Respondent waived his rights and proceeded to confess to the murder of a young girl. After being charged with murder, respondent moved to suppress his statements as made involuntarily. A psychiatrist testified that respondent believed that the voice of God had

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[2]This action is even less justifiable than the improper decision to order reargument in New Jersey v. T.L.O., supra, since here the Court cannot even point to having heard oral argument as justification for revising the issues presented to suit its own desires.

commanded him to confess or commit suicide. The psychiatrist testified that respondent was suffering from "chronic paranoid schizophrenia" and "command auditory hallucinations" when he confessed and that respondent's actions were not the product of a free will. The trial court suppressed statements made both before and after the Miranda warnings were given on the ground that respondent's mental state rendered these confessions involuntary and tainted his waiver of the Miranda rights. The Colorado Supreme Court affirmed, and this petition followed. The prosecutor carefully limited his petition to this Court to challenge only the suppression of respondent's initial, unsolicited statements. The petition expressly states that "[respondent's] later confession, which involves a Miranda issue, is not an issue in this petition." Pet. for Cert.

15. Despite this, the Court directs the parties to brief and argue that issue.

We do not know why the prosecutor chose not to seek review of the Miranda issue. But, whatever the reason, review was not sought, and it is hardly for this Court to "second chair" the prosecutor to alter his strategy or guard him from mistakes. Under our Rule 21.1(a), "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Given petitioner's express disclaimer that the Miranda issue is presented, that question obviously is not "fairly included" in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be

granted a criminal defendant, however strong his claim. In asking the parties to address issues that the State chose not to present in the petition for certiorari, the Court goes beyond a mere philosophic inclination to facilitate criminal prosecution: the Court gives the appearance of being not merely the champion, but actually an arm of the prosecution.[3]

I realize that, in itself, this order is not a matter of great significance. But even matters of small effect can cloak issues of great moment. In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers

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[3]I express no views about the merits of the issues on which certiorari is now granted. See Ohio ex rel. Eaton v. Price, 360 U.S. 246(195()(statement of BRENNAN,J.).

recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen -- guilty or innocent -- is treated fairly and accorded dignity and respect by the State. Of course, the Framers could not foresee the shape our society would take as the nation developed. Nor could they foresee how the police function would evolve to keep pace. Rather, it has fallen to this Court -- the "ultimate interpreter of the Constitution," Baker v. Carr, 369 U.S. 186, 211 (1962) -- to enforce the rights enshrined in the Bill of Rights and preserve the principles established in 1789. Ours is the duty to prevent encroachment on these principles by

over-zealous police in the discharge of their great responsibility to prevent crime. Every law-abiding citizen shares with the Court the belief that the prevention of crime is an essential governmental function. However, the members of this Court have the special responsibility to recognize that, as essential as is the goal of preventing crime, "the Court must be ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor." Florida v. Myers, ___U.S., at ___(STEVENS, J., dissenting). This Court has, sadly, lost sight of this role, to the detriment of the rights of each of us. I can only repeat: "One can only hope that this day too will soon pass." Wainwright v. Witt, ___U.S., at ___ (BRENNAN,J., dissenting).

Supreme Court, U.S.
FILED
MAR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-660

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Did the respondent's mental condition render his initial, unsolicited confession to murder constitutionally involuntary?

2. Did the respondent's mental condition render his waiver of Miranda rights ineffective?

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THE STATE OF COLORADO,

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FRANCIS BARRY CONNELLY,

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF PETITIONER

CITATION

People v. Connelly, 702 P.2d 722 (Colo. 1985).

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked by writ of certiorari, pursuant to 28 U.S.C. Sec. 1257 (1966), on the ground

that the highest court of the State of Colorado has rendered a final judgment in which a right, privilege or immunity is specially set up or claimed under the Constitution of the United States. The Petition for Writ of Certiorari was filed within 60 days of the date of the Colorado Supreme Court's order giving final effect to its interlocutory opinion as required by United States Supreme Court Rule 20.1. The Petition for Writ of Certiorari was granted on January 13, 1986.

CONSTITUTIONAL PROVISIONS

1. U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent is the defendant in a prosecution for second degree murder filed in Denver, Colorado on August 31, 1983 (J.A. 1). He was held incompetent to proceed until March 7, 1984 (J.A. 1). On May 25, 1984 the district court heard the defendant's motion to suppress his confession and suppressed all statements made to the police and any evidence

derived from them as involuntary and in violation of Miranda rights (J.A. 37-51). The petitioner took an interlocutory appeal to the Colorado Supreme Court, which affirmed the suppression of the defendant's statements on July 8, 1985, and remanded for further proceedings relative to any derivative evidence. Petition for Writ of Certiorari, Exhibit A. The Petition for Writ of Certiorari was granted by this court on January 13, 1986, and the parties were requested to address the effectiveness of the defendant's waiver of Miranda rights (J.A. 52).

At the May 25 suppression hearing, the district court heard the testimony of Officers Anderson and Antuna, to whom the statements were made; Greta Lindecrantz, an investigator for the public defender who observed the defendant after his

confession; and Dr. Metzner, a psychiatrist who examined the defendant. This is the only testimony taken thus far in the case. At the conclusion of the hearing, the district court made findings of fact and conclusions of law in its ruling, which included the following.

On August 18, 1983 the defendant approached Officer Anderson, who was in uniform in downtown Denver, and told him that he had killed someone and wanted to talk about it with the police. After the defendant was advised of his Miranda rights, searched, and cuffed, he told Anderson that he had killed a girl with whom he had been travelling about November of 1982 in the vicinity of West Mississippi Avenue (J.A. 37-38).

Anderson notified the Denver Police Department and when Detective Antuna arrived, he uncuffed and readvised the

defendant and took him to police headquarters. The defendant told Antuna that he had been travelling with a young Indian girl named Mary Ann Junta. When a records check indicated that an unidentified female had been killed, the defendant was asked and agreed to take police officers to the location of the homicide (J.A. 39). He walked to the rear of a building, became visibly upset, said he was frightened, and walked into a storage room where he said the killing happened (J.A. 40).

The court found that no suggestions were made and no directions were given by the officers. They merely followed instructions (J.A. 40). The defendant appeared to Detective Antuna to be sane, not ill in any way, and oriented at least as to place (J.A. 40-41). The conduct of the officers could not in any way be

considered by the court to be overbearing or coercive (J.A. 41), and there was legally nothing untoward in the police actions in receiving and recording the defendant's statements to them (J.A. 43).

The ultimate conclusion of Dr. Metzner was that the defendant was suffering from chronic schizophrenia when he was told by the voice of God to go to Denver from Boston and tell the police everything or kill himself (J.A. 42-43). The court found that the defendant did not exercise free will in making the statements because his choices were mandated by auditory hallucinations and had no basis in reality (J.A. 47). Similarly, the court found that the defendant did not effectively waive his Miranda rights because he would sign anything or do anything to follow what he

considered to be the mandate of God to confess (J.A. 48-49).

SUMMARY OF THE ARGUMENT

1. The Due Process Clause of the Fourteenth Amendment protects individuals from official overreaching. To the extent that the old due process voluntariness standard for determining the admissibility of confessions is a constitutional standard, it is limited to protection against official overreaching. While some confessions may be held inadmissible for other evidentiary or policy reasons, confessions are properly suppressed as constitutionally involuntary only if they were obtained through official overreaching and only then are the formal and substantive consequences of a due process violation involved.

2. The Miranda warnings and the old due process voluntariness standard are

designed to vindicate the same rights, the former applying to inherently coercive custodial interrogation. An effective waiver of Miranda rights, like waiver of constitutional trial rights, must be knowing and intelligent. As a matter of due process generally, it must also be voluntary. A waiver of Miranda rights is therefore effective if it is knowing and intelligent and not the product of some other type of official overreaching.

ARGUMENT

I. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT THE DEFENDANT'S INITIAL, UNSOLICITED CONFESSION WAS PROPERLY SUPPRESSED AS INVOLUNTARY.

The Colorado Supreme Court affirmed suppression of the defendant's initial statement as involuntary, despite finding that it was unsolicited and not the product of questioning or any form of police action. It held squarely that there need be no official action

whatsoever in obtaining a confession for its suppression to be required as a matter of due process of law. Relying upon language from Culombe v. Connecticut, 367 U.S. 568 (1961), and Townsend v. Sain, 372 U.S. 293 (1963), the Colorado court found that the ultimate test for voluntariness is whether the statement was the product of a rational intellect and a free will. If it was, it may be used against is maker at trial; if not, its admission at trial offends due process of law. Slip op. at 18. Similarly, it relied upon Blackburn v. Alabama, 361 U.S. 199 (1960), for the proposition that one's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure. Slip op. at 19.

Although the prior holdings of this court relied upon by the Colorado court

use the terms "rational intellect" and "free will" in describing the due process voluntariness standard, they cannot be read so broadly as to require suppression based on mental factors alone. They each address a situation of custodial interrogation and oppressive circumstances. In each case the defendant not only suffered from a mental defect; he was subjected to prolonged interrogation. Both the factual circumstances being addressed and the context in which the words were used make clear that the court intended to protect against the individual's will being overborne by official coercion. The scope of the protection should be construed in light of the evil to be protected against.

In fact, this court has never decided a case or controversy in which it found the use of an unsolicited confession to be

a violation of due process. To the contrary, it has consistently, and very recently, emphasized that the voluntariness standard contained in the Due Process Clause is concerned with the effects of interrogation techniques and official practices on the individual. In Miller v. Fenton, 106 S.Ct. 445 (1985), the court referred to official conduct no fewer than ten times in defining the nature of the due process voluntariness standard. Using terms like "interrogation techniques," "extracted," "improperly obtained," and "tactics for eliciting," the court held, in sharp contrast to the Colorado court below, that the ultimate issue is not a matter of "psychological fact" at all but rather is a legal one - whether the state has obtained the confession in a manner that comports with

due process. Miller v. Fenton, 106 S.Ct. at 450. Summarizing, the court said:

> Although sometimes framed as an issue of "psychological fact," Culombe v. Connecticut, 367 U.S., at 603, 81 S.Ct., at 1879, the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, e.g., Mincey v. Arizona, 437 U.S., at 402, 98 S.Ct., at 2418. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, e.g., Gallegos v. Colorado, 370 U.S. 49, 51, 82 S.Ct. 1209, 1211, 8 L.Ed.2d 325 (1962)(suggesting that "a compound of two inferences" requires that some confessions be condemned); Culombe v. Connecticut, 367 U.S., at 605, 81 S.Ct., at 1880 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry, subsuming as it does, a "complex of values,"

> Blackburn v. Alabama, 361 U.S., at 207, 80 S.Ct., at 280, itself militates against treating the question as one of simple historical fact.

Id. at 453.

It is certainly telling that the voluntariness of confessions from state courts has been analyzed in terms of due process because the Due Process Clause of the Fourteenth Amendment protects individuals from an abuse of power by government officials. Daniels v. Williams, 106 S.Ct. 662 (1986). To the extent that the "voluntariness" of a confession is a "convenient shorthand" for the "complex of values" involved in the Due Process Clause, it can be concerned only with official overreaching. Whether or not one acts according to his free will, however that concept may be defined, is a question of "psychological fact" and should be distinguished from the question

whether or not one is officially deprived of his free will. To guarantee an individual that he will not be forced by the state to confess is one thing; to limit the circumstances under which he will be permitted to confess is quite another. At issue is the nature of the influences on one's exercise of free will that can and should be considered constitutionally cognizable.

The Colorado court did not address the content of the complex of values protected by the Due Process Clause. Instead it treated "voluntariness" simply as a question of psychological fact,[1]

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[1]This confusion about the nature of the voluntariness determination also appears in disputes over whether the jury should ultimately pass on a due process question, by what standard of proof, and how the term "voluntary" should be defined for them. See Kwiatkoski v. People, 706

(Footnote Continued)

without regard to the source of the influences on the defendant's will, and it considered the significant question to be whether there was sufficient state action to make the Fourteenth Amendment applicable. It found sufficient state action in the prosecution's use of the confession at trial. The court offered no explanation why the use of a confession not obtained in any constitutionally offensive way is itself constitutionally offensive and made no attempt to articulate the value to be protected by

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(Footnote Continued)
P.2d 407 (Colo. 1985)(given amorphous nature of term, effort to articulate precise definition might unduly restrict jury in consideration of voluntariness of confession); People v. Deeds, 83CA0080, ___P.2d ___ (Colo. App. July 3, 1985) cert. granted January 27, 1986 (jury finding need only be by a preponderance of evidence despite Colorado pattern jury instruction requiring proof beyond a reasonable doubt).

due process of law. The Due Process Clause protects against official abuse of power or overreaching, not simply against any official action. By looking for a reason why it was permitted to suppress the confession rather than considering whether the confession was one that should be suppressed, the Colorado court failed to advance the inquiry or help define the kinds of influences against which confessions should be protected.

The constitutional right primarily implicated by pre-trial confessions is the Fifth Amendment's privilege against compelled self-incrimination. But the Fifth Amendment is concerned only with official coercion, and not with moral or psychological pressures emanating from any other source. Oregon v. Elstad, 105 S.Ct. 1285 (1985). Therefore, preservation of the defendant's Fifth Amendment trial

right cannot justify suppression here. More importantly, however, the express limitation of the Fifth Amendment to protection against official coercion reflects the nature of the due process protection and implies that the constitution does not prohibit the use of self-incriminating statements that are not the result of official coercion.

The due process prohibition against official overreaching in obtaining a confession has been construed broadly to include not only police conduct that is inherently coercive but also techniques that are improper only because in the circumstances of a particular case, they result in a confession unlikely to have been the product of a free will. Miller v. Fenton, 106 S.Ct. at 450. But where there is no causal relationship between official action and the absence of free

will, that is, where a confession can in no way be considered obtained by official overreaching, the only remaining consideratons are evidentiary. Pressure from any other source, whether it be moral, psychological, or private,[2] may affect the probative value of a confession, but questions of relevance and admissibility have always been within the discretion of the trial court and should

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[2]For its theory of official action by using a confession not obtained by official coercion, the Colorado court relied on its prior holding in Hunter v. People, 655 P.2d 374 (Colo. 1982), in which the confession was given to a security guard. See also Kwiatkoski v. People, 706 P.2d 407 (Colo. 1985)(confession to supervisor and security consultant). While confession to some private individuals might be treated as official under some "public function" theory, Colorado's theory of official action by use of any confession is too broad.

The narrower case against suppression strictly because of mental factors is ably made in the dissent by Justice Erickson.

remain so. The Fourteenth Amendment may protect against police practices that lead to unreliable evidence, but it does not directly insure the reliability of the evidence itself.

Because the due process stricture against involuntary confessions involves a comple. of values, a due process violation requires exclusion of evidence without regard to its reliability. Jackson v. Denno, 378 U.S. 368 (1964). The same rationale for exclusion does not apply to confessions made under pressure from other sources. Confessions made under moral, psychological, or even private pressure should be excluded only when they lack evidentiary value. Whether a particular confession is excluded as involuntary rather than simply as unreliable evidence is significant because characterization as a violation of due process entails a

number of formal differences in treatment including the burden of proof, the scope and standard of review, and even the reviewing court.

Perhaps most important, however, is the treatment of derivative evidence. The rationale articulated in Wong Sun v. United States, 371 U.S. 471 (1963), for exclusion of evidence derived from official misconduct simply cannot apply to a confession that was not the product of official overreaching. Evidence derived from a confession can be instrumental in corroborating it and establishing its reliability. Likewise derivative evidence can be probative of guilt in itself, without reference to the confession from which it was derived. In the absence of official misconduct in obtaining a confession, the reasons for excluding

either reliable confessions or evidence derived from confessions evaporate.

The old due process voluntariness standard has long been recognized as a hybrid, subsuming a complex of values that escape precise definition. The voluntariness determination is to be made by examining the totality of the circumstances. But the anchor that has kept it from floating about freely in a sea of philosophic questions about determinism and free will has been the requirement for a causal relationship between official action and the absence of free will. The influences on the exercise of free will that will be considered improper in the constitutional voluntariness determination are not well defined, but for sound political, as well as practical, reasons they have thus far been limited to the behavior of officials.

To continue to read the Due Process Clause this way will not leave important individual interests unprotected. Evidentiary concerns about involuntary confessions were protected by evidentiary rules long before the doctrine became constitutional law. It is important, however, that the administration of justice not be hindered by the exclusion of valuable, probative evidence simply because the constitutional rule of exclusion has not been tailored to the evil it was designed to prevent. The holding of the Colorado court either trivializes the Fourteenth Amendment by elevating evidentiary considerations to questions of constitutional magnitude, see Daniels v. Williams, 106 S.Ct. at 665, or, worse, excludes even probative evidence of guilt from the truth seeking process in

the absence of constitutionally offensive behavior.

II. THE COLORADO SUPREME COURT ERRED IN HOLDING THAT ALL SUBSEQUENT STATEMENTS WERE PROPERLY SUPPRESSED FOR FAILURE OF THE DEFENDANT TO EFFECTIVELY WAIVE HIS MIRANDA RIGHTS.

At the suppression hearing, Dr. Metzner testified that the defendant was aware of what was happening and could understand his rights (J.A. 25-26), but that he was deprived of a meaningful choice whether or not to confess because he believed his only alternative was to kill himself (J.A. 29). The district court found him unable to voluntarily and intelligently waive his Miranda rights because the choices with which he believed himself to be faced were really figments of his imagination and the product of his psychosis. (J.A. 48-49). The Colorado Supreme Court upheld the ruling, characterizing it as a determination that

the defendant was incapable of making an intelligent and free decision with respect to his constitutional rights.[3]

The Fifth Amendment prohibits use by the prosecution in its case in chief only of officially compelled testimony. It is not at all concerned with moral or psychological pressures to confess emanating from sources other than official

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[3]The district court did not actually distinguish the initial statement from those made after Miranda warnings. Because of the defendant's mental condition, it held that none of his statements were voluntary and therefore, "if we would even get that far," it would not be possible to show an effective waiver of Miranda rights (J.A. 48). Since Lego v. Twomey, 404 U.S. 477 (1972), Colorado requires voluntariness of a confession to be proved by a preponderance of the evidence, People v. Smith, 179 Colo. 413, 500 P.2d 1177 (1972) overruling People v. Kelley, 172 Colo. 39, 470 P.2d 52 (1970), but it continues to require that an effective waiver of Miranda rights be demonstrated by "clear and convincing" evidence. See, e.g., People v. Fish, 660 P.2d 505 (Colo. 1983).

coercion. Oregon v. Elstad, 105 S.Ct. 1285, 1292. In Miranda v. Arizona, 384 U.S. 436 (1966), the court found that custodial interrogation by the police was inherently coercive and consequently held that detailed warnings were required to protect the privilege against compelled self-incrimination. Schneckloth v. Bustamante, 412 U.S. 218, 241 (1973). In the absence of the prophylactic Miranda warnings and either exercise or effective waiver of them, it is irrebutably presumed that any statement was the product of official coercion. Oregon v. Elstad, 105 S.Ct. at 1293.

The court made clear that the basis for the decision was the need to protect the fairness of the trial itself. Schneckloth v. Bustamante, 412 U.S. at 241; Miranda v. Arizona, 384 U.S. at 446. Therefore, even though failure to

administer Miranda warnings is not itself a violation of the Fifth Amendment, Oregon v. Elstad 105 S.Ct. at 1292 n.1, the standards announced in Johnson v.Zerbst, 304 U.S. 458 (1938), for waiver of those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial, Schneckloth v. Bustamante, 412 U.S. at 237-241, have been required to find a valid waiver. In Johnson v. Zerbst the court said that the state must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." Id. at 464. The requirement is generally described as a "knowing and intelligent" waiver. E.g., Schneckloth v. Bustamante, supra; Edwards v. Arizona, 451 U.S. 477 (1981).

Although the court in Johnson did not separately refer to voluntariness, numerous subsequent cases have. In

Miranda, the court expressly permitted waiver of Miranda rights provided the waiver was voluntary. In Edwards v. Arizona, the court expressed the notion that Johnson added a requirement of awareness to the due process requirement of voluntariness that already existed by considering it reasonably clear that "waivers of counsel must not only be voluntary, but also constitute a knowing and intelligent relinquishment of a known right or privilege." Id. at 483. Edwards also intuitively linked the voluntariness of a waiver with the voluntariness of the admission itself, finding that a determination of the voluntariness of the admission still left unresolved the knowing and intelligent waiver of counsel. Id. at 485. Whether or not a waiver is effective is determined in the totality of the circumstances in a process analogous

to determining the voluntariness of a confession. There is not the slightest suggestion in these cases that the term "voluntary" as applied to waiver of a known constitutional right takes into account any influences on a defendant's will not taken into account by the due process voluntariness standard, or that the formula "voluntary, knowing, and intelligent" means more than being aware of the right to be waived, understanding the consequences of the waiver, and doing so in the absence of any other official overreaching.

The relationship between the Fourteenth Amendment and the requirements for waiver of particular constitutional trial rights is most clear in the context of confessions. The constitutional right of the individual to be vindicated is the same whether or not there is custodial

interrogation. However, the right to have counsel present and to be warned of one's right to remain silent have been extended to the "inherently coercive" atmosphere of custodial interrogation, in order to fully protect the individual's Fifth Amendment privilege against compelled self-incrimination. The requirements of Miranda are an added safeguard to protect against an increased danger of official overreaching. Custodial interrogation is a special instance of official action in obtaining confessions, and therefore an individual is protected in that situation not only by the general due process prohibition against official overreaching but also by the requirement that he be aware of certain specific rights and the consequences of proceeding without exercising them.

This relationship holds equally for waiver of constitutionally granted trial rights generally. There is a clear justification for requiring at an official proceeding at which an individual's life, liberty, and property are at stake that he either be given the rights expressly designed to insure him a fair trial or be made aware of these rights and the consequences of foregoing them. To officially proceed otherwise is itself a kind of official overreaching. Just as custodial interrogation is a special instance of pretrial confessions, a criminal trial is a special instance of government action against individuals. And just as due process protects individuals from abuse of power by government officials generally, specific trial rights protect individuals from

abuse of power by the government in a criminal trial.

Although this court has not yet expressly considered the relationship between the Due Process Clause and the test for waiver of special constitutional trial rights, its comments indicate that it added a requirement of awareness or cognition to an existing protection against official interference with the exercise of free will. See Schneckloth v. Bustamante, 412 U.S. 218 (1973). The consequences that one must be aware of to intelligently waive a specific right will inevitably vary depending upon the nature of the right and stage of the proceedings in question. But they have never yet been considered to include consequences not directly caused by the criminal process. With regard to waiver of Miranda rights, the warnings themselves were created in

order to convey the relevant information. Oregon v. Elstad, 105 S.Ct. at 1294; Wong Sun v. United States, 371 U.S. at 486. Thus far this court has never embraced the theory that the defendant's ignorance of even the full official consequences of his decisions vitiates their voluntariness. See Oregon v. Elstad, 105 S.Ct. at 1297. It is even more certain that the voluntariness of a waiver cannot be vitiated by the defendant's belief, mistaken or not, about consequences he might personally experience even though not the direct result of official proceedings, whether they involve his job, his standing in the community, the love and respect of his family, or even his transcendental reward or punishment.

In this case all of the evidence indicates that the Miranda rights were administered and the defendant's

confession was in no way the product of police over.eaching. Not only was the defendant's confession not induced by police action; under the circumstances he probably could not have been prevented from confessing. The evidence also indicates that the defendant was capable of understanding his rights and the official consequences of their waiver. He was simply unconcerned with the official consequences of confessing because they were less important to him than the unofficial consequences of doing otherwise.

What a criminal defendant must know and the influences he must be free of to effectively waive Miranda rights will necessarily evade express enumeration. But it is possible, and highly desirable, to limit the factors to be considered in determining the validity of a waiver to

those pressures on a particular defendant which the behavior of officials or the criminal process itself creates. To fail to tailor the inquiry in this way would come at a high cost to legitimate law enforcement activity and add absolutely no desirable protection to the individual's interest in not being compelled to testify against himself.

CONCLUSION

For these reasons, the Petitioner requests that the holding of the Colorado Supreme Court be reversed.

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Supreme Court, U.S.
FILED
MAY 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Colorado

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause precludes use at trial of an inculpatory statement made to police by Respondent which was compelled by his psychotic mental condition but which was not the result of coercive police conduct?

2. Whether Respondent's mental condition rendered his waiver of *Miranda* rights ineffective?

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STATEMENT OF FACTS

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was working in downtown Denver in an off-duty capacity, though in full uniform, when the Respondent, Francis Connelly, approached him and stated that he had killed someone and wanted to tell him about it. (J.A., 3-4) Anderson's initial response to Mr. Connelly was that he "thought he was some sort of a crackpot." (J.A., 4) Based on Mr. Connelly's statement, Anderson advised him of his *Miranda* rights, conducted a cursory search for weapons and placed him in handcuffs. (J.A., 5-6) Anderson then removed Mr. Connelly from the street and took him into a nearby newsstand. (Transcript of suppression hearing (hereinafter denoted by "Tr.") at page 11.) There Anderson removed Mr. Connelly's wallet and obtained a driver's license from the wallet. (Tr., 11) Anderson used a telephone in the newsstand to call the National Crime Information Center computer network to ascertain if there were any outstanding warrants on Mr. Connelly. (Tr., 12) There were none. (Tr., 12) Meanwhile, Mr. Connelly had given the additional information that he had killed a girl, with whom he had been traveling, in the area of West Mississippi Avenue (a Denver street). (Tr., 12)

Anderson called the Crimes Against Persons Bureau of the Denver Police Department and talked to Detective Stephen Antuna and related to him the information he had obtained from Mr. Connelly. (Tr., 12) Antuna told Anderson to retain Mr. Connelly in custody, and that he would respond to their location. (Tr., 13) While waiting for Antuna, Anderson, who had a "feeling" that Mr. Connelly previously had been in a mental institution. (J.A., 8) asked Mr. Connelly if he had ever been treated for any mental disorders. (J.A., 7) Mr. Connelly replied that he had been in five different hospitals. (J.A., 7; 9) Other than

questioning Mr. Connelly, Anderson did not threaten or promise him anything. (J.A., 8)

When Detective Antuna arrived and had been briefed on the situation by Officer Anderson, he removed the handcuffs and placed Mr. Connelly in his police car. (J.A., 12) Antuna verbally advised Mr. Connelly of his *Miranda* rights and asked him to tell him "what he had on his mind." (J.A., 12) Mr. Connelly said that he wanted to confess to the murder of a young Indian female. (J.A., 12) Antuna then transported Mr. Connelly to Denver Police Headquarters. (J.A., 13) There he contacted an Officer Haney who was more familiar with homicides in Denver, and began checking some records. (J.A., 13)

The records obtained by Officer Haney indicated that the body of an unidentified female had been discovered in April of 1983. (J.A., 13) They went to Haney's office and "began to get more information from Mr. Connelly." (J.A., 14) Upon Detective Antuna's request, Mr. Connelly related to Haney the same information he had told to Antuna. (J.A., 15) Mr. Connelly told them that the murder took place in southwest Denver, and agreed to show them where the murder occurred. (Tr., 27) Antuna and Haney, using Haney's police car, drove Mr. Connelly around southwest Denver where he eventually directed them to a storage area at the rear of a building and stated that it was there that he had killed the woman. (Tr., 29) Mr. Connelly indicated that the murder occurred in November or December of 1982. (Tr., 33)

Mr. Connelly was charged in the District Court of the City and County of Denver, Colorado, on August 31, 1983, with the offense of second degree murder. (Record of pleadings (hereinafter denoted by "Pl.") at page 1) On the next day, September 1, the court remanded Mr. Connelly

to the Colorado State Hospital for an examination as to competency. (Pl., 4) On October 14, 1983, pursuant to a report dated September 22, 1983, which was filed with the court by Dr. Jeffrey Metzner, (Pl., 11-17)[1] the court found Mr. Connelly incompetent to proceed. (Pl., 21; 23)[2] On March 7, 1984, Mr. Connelly was deemed competent to proceed and a preliminary hearing was set. (Pl., 37) Prior to the preliminary hearing Mr. Connelly filed his Motion to Suppress Statements and Evidence on the grounds that because he was incompetent at the time, his confession to police was involuntary and he did not voluntarily, knowingly and intelligently waive his *Miranda* rights. (Pl., 43-44)

Upon completion of the testimony of Detective Antuna at the suppression hearing, the State indicated that it intended to present no further evidence. (Tr., 33) The

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[1] In the introduction to his report Dr. Metzner stated: "A psychiatric examination has been requested regarding the legal issue of . . . [Mr. Connelly's] competency to proceed and competency at the time of allegedly making a confession to the police" (Pl., 11) In the summary and opinion of his report Dr. Metzner concluded:

> It is my opinion that Mr. Connelly continues to suffer from a mental disease or defect which renders him incapable of understanding the nature and course of the proceedings against him, participating or assisting in his defense or cooperating with his defense counsel.
>
> . . . .
>
> Based upon my examination of Mr. Connelly, it is my opinion that he was experiencing psychotic symptoms during the time immediately preceding and following his alleged confession to the police. (Pl., 16-17)

[2] 8 Colo. Rev. Stat. § 16-8-102(3) (1978) provides:

> "Incompetent to proceed" means the defendant is suffering from a mental disease or defect which renders him incapable of understanding the nature and course of proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel.

defense then called Dr. Jeffrey Metzner, who was received as an expert in the field of forensic psychiatry. (J.A., 17) Dr. Metzner stated that at the request of the court he conducted an examination of Mr. Connelly to determine his competency to stand trial as well as his competence to make a confession to the police. (Tr., 48) In the course of his examination Dr. Metzner obtained various information from Mr. Connelly. (J.A., 18) Mr. Connelly stated that on the afternoon of August 17, 1983, when he was in Boston, Massachusetts, he began experiencing God's voice telling him to go to Denver and confess the crime of murder to a policeman. (J.A., 18) Upon arriving in Denver the voices told him that he had only two choices: to confess or to kill himself. (J.A., 19) Mr. Connelly eventually made his way to downtown Denver where he went up to the first policeman he saw and confessed. (J.A., 22)

Dr. Metzner diagnosed Mr. Connelly as suffering from chronic schizophrenia. (J.A., 23) Mr. Connelly's symptoms included the experiencing of auditory hallucinations, *i.e.*, hearing voices that are not really there. (J.A., 24) Dr. Metzner stated that the importance of the voices experienced by Mr. Connelly was that they were of a type called "command hallucinations." (J.A., 25) With this type of hallucination, the person experiencing it feels that he has to act on whatever the voice is telling him. (J.A., 25) Dr. Metzner stated that in his opinion Mr. Connelly's illness did not impair his cognitive abilities, meaning "that when he was read his *Miranda* rights, he probably had the capacity to know that he was being read his *Miranda* rights, and he had certain rights, but . . . I think he wasn't able to use that information because of the command hallucinations that he had experienced." (J.A., 25-26) Upon being asked if he had an opinion whether Mr. Connelly spoke voluntarily to the police, Dr. Metzner

stated: "I don't think that he was able to make a free and intelligent decision in making that statement based on impairment by his chronic schizophrenia." (J.A., 26) Dr. Metzner was then asked whether Mr. Connelly might not have been psychotic when he talked to the police, and he stated that although that was a possibility, based upon his examination of Mr. Connelly, together with the history of records from previous hospitalizations, he was of the opinion that Mr. Connelly was psychotic at that time. With respect to the waiver of rights Mr. Connelly signed, Dr. Metzner stated:

> It's my opinion that Mr. Connelly felt that he didn't have a choice about making a confession. It was not just that his instructions from God and not just instructions, it was that his command from God was that, you go tell the police, and you tell them everything that happened, and you don't have a choice, and if you have to sign things, you sign things, but you have to tell them, and that's what he—in my opinion is what he was acting on.

(J.A., 29)

Upon being asked upon cross-examination whether the voices Mr. Connelly was hearing could be characterized as a guilty conscience, Dr. Metzner stated that in his opinion the voices were primarily attributable to Mr. Connelly's psychotic state. (J.A., 32-34) Finally, in response to a question whether, in view of the fact that Mr. Connelly chose to confess rather than to kill himself he could have chosen to sign the advisement as well, Dr. Metzner stated: "It was my opinion that he really didn't have much of a choice." (J.A., 36)

At the conclusion of the evidence, the trial court stated its findings and conclusions as follows:

Here, in the Court's estimation, there's no question that the Defendant did not exercise free will in choosing to talk to the police. He exercised a choice both of which were mandated by auditory hallucination, had no basis in reality, and were the product of a psychotic break with reality. The Defendant at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did, and he did so in a manner which is not unusual for people who suffer schizophrenia. He was able to do so so that trained, experienced police officers were not able to discern the mental difficulty that the Defendant was having.

The Court feels that with the overwhelming evidence presented by the Defense, that if I must balance this by a preponderance of the evidence that the Prosecution just cannot meet that burden and did not meet that burden under these circumstances. In judging all of the circumstances then . . . the Court feels that the People have not met their burden by a preponderance of the evidence to show that the statement was voluntary.

In addition, the People would have to show if we even would get that far by a standard of clear and convincing evidence that the Defendant waived his right to counsel and his right to self-incrimination, and the Court cannot find by that standard being even a more difficult standard for the Prosecution that he did waive his right to counsel and his right to self-incrimination voluntarily, knowingly and intelligently; rather, he would sign anything, he would do anything to follow the mandate of God to confess because his only alternative was to kill himself, and he did not choose to do that, both alternatives, however, being a figment of his imagination and a very definite product of his psychosis.

(J.A., 47-49)

The Court then ruled that the prosecution could not present any evidence concerning Mr. Connelly's statements to the police after he contacted them. (J.A., 49)

The Colorado Supreme Court affirmed the ruling of the trial court. *People* v. *Connelly*, 702 P.2d 722 (Colo. 1985). After noting that "[t]he issue of voluntariness must be resolved by evaluating the totality of circumstances surrounding the making of the statement," *id.*, 702 P.2d at 728, the court ruled that under that test "[t]he record in this case supports the district court's determination that the defendant's initial statement to Officer Anderson on August 18, 1983 . . . was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action." *Id.*, 702 P.2d at 729.

The Colorado Supreme Court also affirmed the trial court's ruling that Mr. Connelly did not effectively waive his *Miranda* rights as to the subsequent statements made to police:[3]

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[3] In view of its ruling that the subsequent admissions were obtained in violation of *Miranda* requirements, the Colorado Supreme Court did not consider, and thus did not rule on, the question of whether those statements were involuntary under due process standards. Since those statements were not volunteered, but resulted from police questioning, a ruling by this Court that the initial statement to Officer Anderson was voluntary because it resulted from no police action, would not necessarily require the same result with the subsequent statements obtained through police questioning. Similarly, the Colorado court did not consider whether, given the involuntariness of the initial statement, the subsequent statements derived from that statement. *See Darwin* v. *Connecticut*, 391 U.S. 346 (1968); *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Gallegos* v. *Colorado*, 370 U.S. 49 (1962). Since these issues were not considered by the Colorado Supreme Court, they are not properly before this Court for review. *See Illinois* v. *Gates*, 462 U.S. 213 (1983).

> In light of the psychiatric testimony presented to the district court, we see no reason to disturb the court's conclusion that the prosecution failed to prove by clear and convincing evidence that the defendant effectively waived his *Miranda* rights. The testimony of Dr. Metzner clearly established that . . . [the defendant] was incapable of making an intelligent and free decision with respect to his constitutional right of silence while in custody and his constitutional right to confer with a lawyer before talking to the police.

Id., 702 P.2d at 729.

Finally, the court remanded the case to the trial court for further findings as to the trial court's order suppressing evidence derived from Mr. Connelly's statements. Id., 702 P.2d at 730.

SUMMARY OF THE ARGUMENT

1. From the first application of the Due Process Clause of the Fourteenth Amendment to preclude admission of an involuntary confession in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the Court has variously described such confessions as coerced, compelled, not the product of a rational intellect and a free will, not freely self-determined, and not the product of a free and rational choice, to name a few. Nor has a precise definition of an involuntary confession been successfully formulated. The Court has, however, identified the factors to be considered in determining the voluntariness of a confession. Thus, "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973), are considered. Under this "totality of circumstances" standard, everything is relevant but no single factor is determinative. While a common feature of the

involuntariness determination has been the nature and extent of the confinement and interrogation of the defendant, his or her physical and mental characteristics and condition have also been given substantial consideration. In examining these two factors the Court has compared the circumstances of pressure applied in the interrogation process against the power of resistance of the person being interrogated. *Fikes* v. *Alabama*, 352 U.S. 191 (1957).

Both Petitioner and the Solicitor General (hereinafter sometimes referred to as the Government) argue that there can be no Due Process violation in the absence of coercive government conduct. While the cases invariably have involved some aspect of government conduct, usually in the form of coercive interrogation practices, in *Townsend* v. *Sain*, 372 U.S. 293 (1963), the Court noted that a prior case, *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), had "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers." *Townsend*, 372 U.S. at 309. Thus, although the nature and extent of the interrogation process is a factor to be considered in determining the voluntariness of a confession, it is not a prerequisite to a finding of involuntariness if the defendant's mental condition is such that his confession does not result from his "free and rational choice," *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978), to confess.

In the present case the defense presented the testimony of Dr. Jeffrey Metzner, a psychiatrist appointed by the trial court to examine Mr. Connelly to determine his competence to stand trial. Dr. Metzner was of the opinion that Mr. Connelly suffered from severe schizophrenia and was psychotic. A prominent symptom of Mr. Connelly's psychosis was that he experienced command auditory hallucinations. Dr. Metzner explained that this is a type of

hallucination in which the person experiencing it hears voices and feels he has to act on whatever the voice is telling him to do. On the day he confessed to a police officer that he had killed a woman, Mr. Connelly was compelled to do so by voices which told him that the only alternative to confessing was to kill himself. Because Mr. Connelly's confession was compelled by the command hallucinations, Dr. Metzner was of the opinion that his confession was not volitional. In his report to the court, Dr. Metzner found that Mr. Connelly was incompetent to stand trial and that Mr. Connelly had suffered from the mental condition which caused his incompetency at the time he made his confession. The prosecution offered no medical testimony to dispute the findings and conclusions of Dr. Metzner.

Faced with the undisputed testimony of Dr. Metzner that Mr. Connelly was psychotic when he made the confession, and that the particular kind of psychosis from which he suffered compelled him to confess, the trial court ruled that the prosecution had failed to meet its burden of proving Mr. Connelly's confession voluntary. Evaluating the totality of circumstances surrounding the making of the statement, the Colorado Supreme Court affirmed the trial court's ruling, holding that the trial court's determination that Mr. Connelly's confession was involuntary was supported by the evidence. Given the unique factual posture of this case, the undisputed evidence of Mr. Connelly's impaired mental condition, and the Colorado Supreme Court's application of the proper constitutional standard to those facts, its ruling should not be disturbed on review.

2. *Miranda* v. *Arizona*, 384 U.S. 436 (1966), established concrete constitutional guidelines for law enforcement agencies and courts to follow in applying the

privilege against self-incrimination to custodial interrogations. *Miranda* required certain specified warnings to be given persons questioned in custody as a prerequisite to the admissibility of statements obtained thereby. The requirements specified by *Miranda* do not depend on whether the rationale underlying the *Miranda* decision is fulfilled in each particular case. Thus, *Miranda* is applicable to the statements made by Mr. Connelly in response to questioning by police officers if that questioning constituted "custodial interrogation." Since Mr. Connelly was handcuffed by police officers and removed from the street and since his statements were in response to questioning by the officers, the *Miranda* requirements are applicable.

In *Miranda* the Court acknowledged that a defendant could waive the rights to counsel and to remain silent, but placed a "heavy burden" on the government to prove that the defendant voluntarily, knowingly and intelligently waived those rights. Although an express waiver is not required, a valid waiver will not be presumed simply from the fact a confession is eventually obtained. In the present case although Mr. Connelly stated that he understood his rights, this was an insufficient showing to establish a valid waiver.

To be a valid waiver under *Miranda* it must be voluntary as well as knowing and intelligent. In the recent case of *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135 (1986), the Court stated that for a waiver to be voluntary it must be the product of a free and deliberate choice, while the knowing and intelligent aspect requires an awareness of the nature of the right being waived and the consequences of forgoing it. The Court's description of the voluntary component of the waiver requirement substantially resembles that of the due process voluntariness

requirement for confessions. For the reasons stated in Argument 1, above, with respect to the voluntariness of confessions, Mr. Connelly's psychotic mental condition precluded him from voluntarily waiving his constitutional rights to counsel and to remain silent.

Mr. Connelly's impaired mental condition precluded him from being able to knowingly and intelligently waive his rights as well. As noted above, Dr. Metzner's undisputed finding that Mr. Connelly was incompetent to stand trial was based on his diagnosis of Mr. Connelly's mental condition which was present at the time he made the statements to the police officers. Thus, Dr. Metzner effectively found that Mr. Connelly was incompetent at that time as well as later. Mr. Connelly's incompetence clearly rendered any waiver neither knowing nor intelligent.

In order to voluntarily, knowingly and intelligently waive constitutional rights, a person must necessarily have the capacity to acceptably make a choice. Dr. Metzner testified that while Mr. Connelly had the capacity to know that he was being read his *Miranda* rights, he was not able to use that information to consciously choose between waiving his rights and confessing, since the former choice would require his self-destruction. This, of course, was no choice at all. Lacking the capacity to make a conscious choice, Mr. Connelly was precluded by his impaired mental condition from being in a position to voluntarily, knowingly and intelligently waive his right to counsel and to remain silent.

Both the Petitioner and the Government argue that a waiver of constitutional rights can be rendered ineffective only by official overreaching or government coercion, and not by internal psychological pressures. However, these

contentions fail to take into account the unique and unusual circumstances of this case. The substantial and undisputed medical evidence of Mr. Connelly's severe psychotic condition which rendered him incompetent precluded him from having the capacity to voluntarily, knowingly and intelligently waive his constitutional rights.

ARGUMENT

I. THE COLORADO COURTS CORRECTLY RULED THAT MR. CONNELLY'S INCULPATORY STATEMENT TO OFFICER ANDERSON RESULTED FROM HIS PSYCHOTIC MENTAL CONDITION AND ITS USE AT TRIAL WOULD VIOLATE DUE PROCESS OF LAW NOTWITHSTANDING THE ABSENCE OF COERCIVE POLICE CONDUCT.

The Fourteenth Amendment Due Process voluntariness requirement for confessions traces back to the case of *Brown* v. *Mississippi*, 297 U.S. 278 (1936). There, where the evidence showed that the defendants' confessions were obtained by brutally whipping them, "[t]here was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary." *Id.*, 297 U.S. at 283. Accordingly, "the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.*, 297 U.S. at 286.

While the Court in *Brown* used the terms "free" and "voluntary" to describe the due process requirement for confessions, in subsequent cases the Court has ruled violative of due process the admission of confessions that were "coerced" or "compelled" or obtained under "compulsion," *see Malinski* v. *New York*, 324 U.S. 401, 406 (1945); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 153 (1944);

Chambers v. *Florida*, 309 U.S. 227, 239 (1940); "not issue[d] from free choice," *Watts* v. *Indiana*, 338 U.S. 49, 53 (1949); or obtained as the result of "coercive influences," *see Davis* v. *North Carolina*, 384 U.S. 737, 752 (1966). Confessions are also involuntary in a due process sense where the defendant's "will was overborne," *Spano* v. *New York*, 360 U.S. 315, 323 (1959); *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963); where the confession is not "the product of a rational intellect and a free will," *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960); or is not "freely self-determined," *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). In *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), the Court stated that the test for voluntariness is whether the confession is "the product of an essentially free and unconstrained choice by its maker." *Id.*, 367 U.S. at 602. *See also*, *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978) ("Mincey's statements were not 'the product of his free and rational choice.'") (quoting *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968)).

Although the cases have employed a variety of terms to describe confessions, which "by way of convenient shorthand," have been termed "involuntary," *Blackburn*, 361 U.S. at 207, "[t]hose cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973). The difficulty in defining "voluntariness," it has been noted, is that the concept of voluntariness "is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes." *Culombe*, 367 U.S. at 605. *See also Miller* v. *Fenton*, ___ U.S. ___, 106 S.Ct. 445, 453 (1985).

The Court has tended to look at a number of various factors in determining whether a particular confession is

voluntary or involuntary. In *Harris* v. *South Carolina*, 338 U.S. 68 (1949), the Court stated that "[t]he systematic persistence of interrogation, the length of periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances" which determine whether a confession is involuntary. *Id.*, 338 U.S. at 71. Later, in *Culombe* the Court set forth additional factors to be considered in making the voluntariness determination:

> Each of these factors [extensive cross-questioning, undue delay in arraignment, failure to caution a prisoner, refusal to permit communication with friends and legal counsel], in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant.

Id., 367 U.S. at 601-02.

Thus, in determining the voluntariness of a confession "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation" are considered. *Bustamonte*, 412 U.S. at 226 (1973).

Applying the foregoing factors, confessions obtained by brutal torture,[4] deprivation of food or sleep,[5] decep-

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[4] *Brown* v. *Mississippi*, 297 U.S. 278 (1936) (confession by defendant after being brutally whipped).

[5] *Brooks* v. *Florida*, 389 U.S. 413 (1967) (defendant confined for 15 days in a punishment cell and given 12 ounces of food and 8 ounces of water per day).

tion[6] and threats[7] have been held involuntary. Similarly, confessions obtained during extended periods of confinement with prolonged or intense interrogation have also been held involuntary.[8] In these cases, while a common feature of the involuntariness determination was the nature and extent of the confinement and interrogation of the defendant, the Court made frequent references to the physical or mental infirmities or deficiencies of the defendants which reduced their abilities to resist the coercive effects of that confinement and interrogation. In *Chambers* the defendants were "ignorant young colored tenant farmers." *Id.*, 309 U.S. at 238; in *Spano* the defendant was a "foreign-born young man of 25 with no past history of law violation" who had "progressed only

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[6] *Spano* v. *New York*, 360 U.S. 315 (1959) (police officer-friend of defendant falsely told defendant that the officer would lose his job if defendant did not confess); *Leyra* v. *Denno*, 347 U.S. 556 (1954) (confession obtained by psychiatrist skilled in hypnosis whom police represented as physician who would treat defendant's sinus condition).

[7] *Haynes* v. *Washington*, 373 U.S. 503 (1963) (defendant told that he would not be allowed to communicate with his wife until he confessed); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963) (police threatened to take defendant's children away if she did not confess); *Rogers* v. *Richmond*, 365 U.S. 534 (1961) (interrogating officer threatened to take defendant's wife into custody).

[8] *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant confined for 5 days and interrogated intermittently for 12 and a half hours); *Watts* v. *Indiana*, 338 U.S. 49 (1949) (defendant confined for 6 days and subjected to 9 to 10 hours of interrogation on 5 of the 6 days); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944) (defendant confined incommunicado in a small room without sleep or rest for 36 hours and subjected to continuous interrogation); *Chambers* v. *Florida*, 309 U.S. 227 (1940) (defendant held incommunicado for 7 days and subjected to persistent and repeated interrogation, with overhanging threat of mob violence).

one-half year into high school" and "had a history of emotional instability." *Id.*, 360 U.S. at 321-22; and in *Davis* the defendant was "an impoverished Negro with a third or fourth grade education" whose "level of intelligence is such that it prompted the comment by the court below . . . that there is a moral question whether a person of Davis' mentality should be executed." *Id.*, 384 U.S. at 742. Thus, even in cases in which there was evidence of substantial police coercion, the mental characteristics of the defendant were considered a significant factor in the voluntariness determination.

As police interrogation practices became more humane and the physical abuse of defendants diminished or was not present, the Court noted that "police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will." *Jackson* v. *Denno*, 378 U.S. 368, 389 (1964). However, the Court has recognized that confessions obtained under less severe police conduct than had been present in earlier cases may be involuntary nonetheless: "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease." *Spano*, 360 U.S. at 321.

With the emphasis shifted away from physically coercive methods of obtaining confessions toward more sophisticated and subtle practices, the Court began to examine closely the psychologically coercive aspects of the interrogation process as well as the mental capacity of the defendant to resist that coercion. In *Fikes* v. *Alabama*, 352 U.S. 191 (1957), where the defendant was incarcerated for four days and interrogated for several hours a day on three of those days before he made a first

confession, and a second confession was made five days later after another five hours' interrogation, the Court noted at the outset of its opinion:

> It is, of course, highly material to the question before this Court to ascertain petitioner's character and background. He is a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade. There was testimony by three psychiatrists at the trial, in connection with a pleaded defense of insanity, to the effect that petitioner is a schizophrenic and highly suggestible.

Id., 352 U.S. at 193.

Later in the opinion the Court noted that "[t]here is no evidence of physical brutality, and particular elements that were present in other cases in which this Court ruled that a confession was coerced do not appear here." *Id.*, 352 U.S. at 197. The Court then held that the totality of "the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law." *Id.*, 352 U.S. at 198.

Three years later the Court decided *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), which presented a factual situation quite similar to the one in this case. In *Blackburn*, the defendant was arrested shortly after a robbery. About three weeks later, after an eight to nine-hour interrogation session with an hour's break, he confessed to the robbery. The evidence showed that the defendant had a prior history of mental illness and after being charged with the robbery had been found insane and incompetent to stand trial. He was found restored to competency four years later and was tried and convicted with the confession being admitted into evidence at the trial. Although noting that the eight to nine-hour interroga-

tion, the absence of the defendant's friends and relatives and the composition of the confession by the sheriff were "other pertinent circumstances," the primary factor in the Court's holding that the confession "most probably was not the product of any meaningful act of volition," *id.*, 361 U.S. at 211, was the mental illness of the defendant:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Id., 361 U.S. at 207.

A year later, in *Reck* v. *Pate*, 367 U.S. 433 (1961), the defendant was interrogated over a three-day period, was without adequate food, and was considered at least borderline retardation. Thus his "powers of resistance to overbearing police tactics," *id.*, 367 U.S. at 442, were insufficent to allow his confession to be considered voluntary.

In *Townsend* v. *Sain*, 372 U.S. 293 (1963), defendant was injected with prescribed drugs during an interrogation session to alleviate severe heroin withdrawal symptoms. Unknown to the police, one of the drugs injected had properties of a "truth serum." Additionally, a prosecution expert testified that the defendant was of such a low intelligence that he was a near mental defective and just a little above a moron. About an hour after the injection was administered, the defendant confessed to a

robbery and murder. In holding the confession inadmissible as involuntary, the Court stated: "It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'" *Id.*, 372 U.S. at 307-08. The Court then noted that in *Blackburn* it had "held irrelevant the absence of evidence of improper purpose on the part of the questioning officers." *Id.*, 372 U.S. at 309.

The foregoing progression of cases illustrates that as police conduct in obtaining confessions has evolved from the use of physical force and brutality to more subtle forms of psychological persuasion, the Court has increasingly looked to the mental condition of the defendant and the effect upon his or her mental state of the particular police conduct involved. And where there has been no impermissible police conduct, as in *Blackburn* and *Townsend*, the deficient mental condition of the defendants in those cases was sufficient to render their confessions involuntary. A rational application, not extension, of prior decisions of this Court fully supports the Colorado courts' conclusions that the admission of Mr. Connelly's confession to Officer Anderson at trial would violate his right to due process of law. Such a holding would involve no "new constitutional rule" designed to protect citizens from their own "self-generated compulsion to reveal information to the authorities." Brief of the United States at 10. Rather, it would involve simply an acknowledgement of the principles previously established in *Blackburn* and *Townsend* that under particular circumstances a confession may be involuntary even though there is no impermissible police conduct.

Given the unusual and unique circumstances of Mr. Connelly's severely impaired mental condition, the

absence of government coercion does not require reversal of the Colorado courts' findings of involuntariness. Dr. Metzner's undisputed testimony established that at the time of the confession Mr. Connelly was suffering from chronic schizophrenia and was experiencing command hallucinations under which his only option to making a confession was self-destruction. Also undisputed was Dr. Metzner's opinion that Mr. Connelly's mental condition was so substantially impaired that his confession was not the product of a free and rational decision. Finally, Dr. Metzner's determination that Mr. Connelly was so mentally impaired that he was incompetent to proceed judicially renders any confession made while under that disability clearly involuntary, and use of such a confession at trial would affront a "most basic sense of justice." *See Blackburn*, 361 U.S. at 201-02, 207. *See also*, *Iverson* v. *North Dakota*, 480 F.2d 414, 428 (8th Cir. 1973) (although statement obtained outside custodial interrogation setting, case remanded for hearing on competency of the defendant; if defendant was not competent, statement was involuntary and may not be used for any purpose); *Eisen* v. *Picard*, 452 F.2d 860 (1st Cir. 1971) (although trial court found no threats, pressure or suggestions by police officers in obtaining statements, it erred in failing to consider whether defendant's insanity rendered them involuntary); *United States* v. *Silva*, 418 F.2d 328 (2d Cir. 1969) (trial court erred in finding confession voluntary without receiving evidence as to defendant's mental condition). Thus the ruling of the Colorado courts that under the totality of the circumstances Mr. Connelly's statement was involuntary was factually and legally correct, and Mr. Connelly's statement to Officer Anderson was inadmissible "in any way" against him at trial. *Mincey*, 437 U.S. at 402.

The primary contention of both Petitioner and the Government in their respective briefs is that there can be no violation of the Due Process Clause in the absence of coercive government conduct. Brief of Petitioner, at 14; Brief for the United States, at 12.[9] However, as noted earlier, the determination of voluntariness depends upon an assessment of "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation," *Bustamonte*, 412 U.S. at 226. There the Court surveyed a number of cases in which confessions had been found involuntary in a due process context and noted that "[t]he significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion." *Ibid.*

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[9] In its brief the Government notes that "[t]he most difficult question would arise when the suspect has a weakness or susceptibility not known to the police but in fact making him especially vulnerable to some otherwise permissible form of interrogation." Brief of the United States, at 16 n.4. The Government thus appears to recognize that a confession in a particular situation may be considered involuntary without official coercion. See *United States* v. *Murphy*, 763 F.2d 202 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 812 (1986). (statements by defendant made out of fear of being bitten by police dogs used to arrest him held involuntary); *United States* v. *Brown*, 557 F.2d 541 (6th Cir. 1977) (statements by defendant induced by fear of beating by police, but which were not in response to questioning held involuntary); *Commonwealth* v. *Louraine*, 390 Mass. 28, 453 N.E.2d 437 (1983) (defendant's insanity may render spontaneous inculpatory statements he made at scene of crime upon arrival of police involuntary); *State* v. *Caouette*, 446 A.2d 1120 (Me. 1982) (fact that defendant was emotionally upset when he made spontaneous statement adequately supported trial court's finding that statement was involuntary); *Commonwealth* v. *Mozillo*, 443 Pa. 171, 278 A.2d 874 (1971) (spontaneous statements made to correctional facility guard while defendant incompetent to stand trial held inadmissible as unreliable).

Thus, the absence of government conduct in obtaining a confession in and of itself cannot preclude a finding of involuntariness where the overwhelming evidence of Mr. Connelly's impaired mental condition clearly indicated that his confession to Officer Anderson was not "the product of a rational intellect and a free will." *Blackburn*, 361 U.S. at 208. Accordingly, "*any* criminal trial use against . . . [Mr. Connelly] of his *involuntary* statement is a denial of due process of law." *Mincey*, 437 U.S. at 398. (emphasis in original) *See also Brooks*, 389 U.S. at 415 (1967); *Culombe*, 367 U.S. at 635; *Blackburn*, 361 U.S. at 205.

II. MR. CONNELLY'S PSYCHOTIC MENTAL CONDITION RENDERED HIS WAIVER OF *MIRANDA* RIGHTS INEFFECTIVE.

A. *Applicability Of Miranda* v. *Arizona*.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966) this Court established "concrete constitutional guidelines for law enforcement agencies and courts to follow" in "applying the privilege against self-incrimination to in-custody interrogation[s]." *Id.*, 384 U.S. at 441-42. Accordingly, the Court there held

> that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary.

Michigan v. *Mosley*, 423 U.S. 96, 99-100 (1975).

The applicability of these requirements does not, as suggested by the Government, depend on whether their

underlying rationale is fulfilled in each particular case. Rather, "the Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468.

Miranda applies only to statements obtained through "custodial interrogation," that is, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id.*, 384 U.S. at 444, and expressly exempts volunteered statements from its reach: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, 384 U.S. at 478. Thus Mr. Connelly's initial statement to Officer Anderson is not subject to the *Miranda* requirements.

While Petitioner does not question the applicability of *Miranda* to Mr. Connelly's subsequent statements to Officer Anderson,[10] the Colorado Attorney General does question whether they were obtained pursuant to custodial interrogation,[11] and the Solicitor General, while conceding that Mr. Connelly was in custody, asserts that

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[10] In the Brief of Petitioner the State does not allege that Mr. Connelly's statements were not the result of custodial interrogation. The State's concession of custody and interrogation should be determinative of the issue. *Oregon* v. *Elstad*, ____ U.S. ____, ____, 105 S.Ct. 1285, 1297 (1985).

[11] *See* Brief *Amici Curiae* in Support of the Petitioner by the Colorado Attorney General and the 35 *Amici* that Appear on the Inside Cover at 13, n.10.

the questioning was not "interrogation," but rather merely "follow-up questioning" to the initial volunteered statement.[12] Since the subsequent statements were made to Anderson by Mr. Connelly after he was handcuffed and removed from the street, he certainly was in custody. *See New York* v. *Quarles*, 467 U.S. 649, 655 (1984). And since Mr. Connelly's statements were made in response to questioning by Anderson, the interrogation requirement was also met. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect.")

B. Effectiveness Of Waiver.

In *Miranda*, the Court acknowledged that a defendant could waive the required rights and make a statement that would be admissible in court. However, the Court cautioned:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are

[12] Brief for the United States at 22-23 n.7, 25.

> given or simply from the fact that a confession was in fact eventually obtained.

Id., 384 U.S. at 475.

Although an express waiver is not required, "[t]he courts must presume that a defendant did not waive his rights." *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979). In the present case, although Mr. Connelly stated that he understood his rights and answered the officers' questions, under *Miranda* and *Butler* this is not enough to constitute a valid waiver. *See also*, *Tague* v. *Louisiana*, 444 U.S. 469, 471 (1980). Assuming, however, that a waiver occurred, Mr. Connelly's impaired mental condition rendered it ineffective.

In *Miranda* the Court adopted the test formulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—"an intentional relinquishment or abandonment of a known right or privilege"—for determining the validity of a waiver of the constitutional rights to counsel and to silence. Since the Court in *Johnson* had also stated that there must be "an intelligent and competent waiver by the accused," *id.*, 304 U.S. at 465, the Court in *Miranda* indicated that the waiver must be voluntary as well. *Miranda*, 384 U.S. at 444, 476. *See also*, Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 200 (1977). Subsequent cases have adopted this view and emphasized that voluntariness is a component of a waiver of *Miranda* rights. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *Butler*, 441 U.S. at 373. The determination of the validity of a waiver of Miranda rights is to be made upon "an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo

his rights to remain silent and to have the assistance of counsel." *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979). *See also, Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981) (quoting *Johnson* v. *Zerbst*, 304 U.S. at 464):

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

In *Edwards* the Court also indicated that "the voluntariness of a consent or admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." *Id.*, 451 U.S. at 484.

In the recent case of *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135 (1986), the Court, citing *Edwards*, reiterated the standards for determining waiver under *Miranda*:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id., ___ U.S. at ___, 106 S. Ct. at 1141.

The Court's description of the voluntary component of the waiver requirement in *Burbine* substantially resembles that of the traditional due process voluntariness requirement of confessions which requires the "exercise

of 'a rational intellect and a free will.'" *Mincey* v. *Arizona*, 437 U.S. at 398. *See also, Elstad*, ___ U.S. at ___, 105 S. Ct. at 1285, 1293 (1985). Given the large body of decisional law presently existing in the due process area, any determination of whether a waiver is voluntary should be made with reference to those circumstances in which a confession is considered to be voluntary in a due process sense. Since, as established in Argument I, *supra*, Mr. Connelly's psychotic mental condition rendered his confession involuntary in a due process context, his subsequent statements should likewise be considered involuntary for purposes of the voluntary component of the *Miranda* waiver requirement.

As in the due process voluntariness of confessions context, the State and the Government contend that a waiver of constitutional rights can be invalidated only by official overreaching or government coercion, and not by internal psychological pressures. Allowing a consideration of such pressures, the Government asserts, "would force courts to confront complex and uncertain issues of 'free will' in order to evaluate the propriety of a *Miranda* waiver, and make it difficult for police officers to predict in advance whether a suspect's waiver would be upheld." (Brief for the United States at 29)

However, as indicated in Argument I, *supra*, this Court traditionally has considered the mental condition and characteristics of the defendant in determining whether a confession is voluntary. Moreover, a totality of circumstances standard, by definition, would include the mental features of a particular defendant, and any lack of predictability in determining the validity of a waiver is attributable more to the nature of the standard than to the factors which are included or excluded in applying it.

The effect of Mr. Connelly's impaired mental condition is not limited to the voluntary component of the waiver requirement. It is applicable as well to the requirements of a knowing and intelligent waiver. As noted above Dr. Metzner, in his initial report submitted to the trial court, concluded that Mr. Connelly was incompetent to proceed to trial and that his psychosis which resulted in this incompetence existed at the time of the confession and statements. In light of this uncontested evidence that Mr. Connelly was incompetent at the time of the statements made to police officers in response to questioning, he clearly could not have knowingly and intelligently, as well as voluntarily, waived his rights to counsel and to remain silent.

In discussing the value of waivers in criminal cases the Court has noted that "[u]nless an individual is incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." *Mosley*, 423 U.S. at 108-09 (1975) (White, J., concurring). In so stating, the Court has necessarily recognized that a person who is not mentally competent may not be able to voluntarily, knowingly and intelligently waive his rights. *See also*, *Pate* v. *Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."); *Westbrook* v. *Arizona*, 384 U.S. 150 (1966) (finding of competence to stand trial not determinative of competence to waive right to representation of counsel); *Moore* v. *Ballone*, 658 F.2d 218 (4th Cir. 1981) (defendant's impaired mental condition invalidated *Miranda* waiver).

The undisputed evidence of Mr. Connelly's impaired mental condition should preclude a determination that he

voluntarily, knowingly and intelligently waived his constitutional rights. Such a determination necessarily presupposes a "capacity acceptably to evaluate and to choose among different courses of action." Dix, *supra*, at 260. The testimony of Dr. Metzner refutes the notion that Mr. Connelly possessed any capacity to choose between exercising or waiving his rights to counsel or to remain silent. While Dr. Metzner indicated that in his opinion Mr. Connelly had the capacity to know that he was being read his *Miranda* rights, he was of the further opinion that Mr. Connelly "wasn't able to use that information because of the command hallucinations that he had experienced." (J.A., 26) From Mr. Connelly's perspective the choice between waiving or exercising his rights was indistinguishable from a choice between life or death, which, of course, is no choice at all. Lacking the capacity to make a conscious choice between these options, Mr. Connelly could not be said to have waived his rights to counsel and to remain silent. Thus, the trial court's ruling, supported as it was by Dr. Metzner's substantial and uncontradicted testimony as to Mr. Connelly's severely impaired mental condition at the time he made the confession and statements, was correct and the Colorado Supreme Court's affirmance of it was, correct as well.

CONCLUSION

For the foregoing reasons, Respondent submits that the judgment of the Colorado Supreme Court should be affirmed.

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Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-660

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

REPLY BRIEF

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ARGUMENT

A FINDING OF INCOMPETENCE TO PROCEED TO TRIAL IS NOT DISPOSITIVE OF THE VOLUNTARINESS OF A PRIOR CONFESSION OR THE EFFECTIVENESS OF A PRIOR WAIVER OF MIRANDA RIGHTS.

In his brief on the merits, the defendant asserts that the undisputed evidence established that he suffered from an impaired mental condition, schizophrenia, and was incompetent to proceed to trial at the time of his confession. He argues that this evidence necessarily indicates that he lacked the capacity to make a voluntary confession or effectively waive his Miranda rights. While he does not assert that finding a defendant incompetent to proceed procedurally bars a determination that a prior confession was voluntary, he clearly asserts that one cannot be incompetent to

proceed and act either voluntarily or knowingly and intelligently.

Reference to the defendant's mental condition merely reformulates, without answering, the question whether his confession and waiver were voluntary because the issue before the court is whether "involuntary" in the constitutional sense means anything other than induced by official coercion or impermissible official interference with the exercise of free will. If mental disturbance alone can be sufficient to render a confession or waiver constitutionally involuntary, whether or not official action caused it, the trial court's holding on voluntariness is supported by the record. However, the assertion that Dr. Metzner's testimony of the defendant's incompetence to proceed precludes the possibility that he could

make any knowing and intelligent waiver is unsupported in law and contrary to the doctor's own findings. If the constitutional standard for competence to proceed were actually inconsistent with any knowing or intelligent waiver, this record would raise more questions about the determination of incompetence than about the defendant's capacity to waive.

It is precisely Dr. Metzner's finding about the defendant's cognitive capabilities and the narrowness of the trial court's suppression ruling resulting from it that raises the Miranda-waiver issue in this court. The undisputed psychiatric testimony was that the defendant's mental disorder "really affect[ed] his volitional abilities . . . [but] did not significantly impair his cognitive abilities. . ." (J.A. 25). The doctor said that the defendant probably

had the capacity to know that he was being read his Miranda rights and that he had those rights (J.A. 26). All four times Metzner talked with the defendant he could "relate accurately those cognitive facts, historical data," (J.A. 34-35) and Metzner could not say that the defendant was unable to do so at the time of his confession as well (J.A. 35). The trial court limited its ruling to voluntariness and held both the confession and waiver involuntary because the defendant "would do anything to follow the mandate of God" (J.A. 48-49). Given the clear distinction drawn by the expert between volitional and cognitive capacity, the court never found that the defendant lacked the capacity to (or did not) understand his Miranda rights or the consequences of waiving them, and its ruling would not have been supported by the record if it had.

Similarly, Dr. Metzner, solely on the basis of whose report the defendant was held incompetent to proceed from October 1983 until March 1984, gave his reasons for finding the defendant incompetent. The doctor felt that the defendant was "coming in and out of psychoses," and therefore the doctor "wasn't very confident that he could consistently relate accurate information" (J.A. 35). By his February 1984 exam he felt confident that the defendant could do so consistently. Although this court has rarely commented on the question of competency, it has held that due process of law prohibits trial of someone who cannot consult rationally with his counsel and rationally and factually understand the proceedings, because in such a case his condition would effectively preclude operation of the adversary process. See Drope v. Missouri, 420 U.S. 162 (1975);

Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Bishop v. United States, 350 U.S. 961 (1956). Whether or not the doctor's concerns would have required a finding of constitutional incompetence to proceed, his own explanation shows that his decision was based on an assessment of the defendant's capacity to assist his counsel consistently over an extended period of time, not any incapacity to understand or because of any general diagnosis of schizophrenia or impaired mental condition.

The defendant's approach suggests that the court blur rather than refine and clarify the standards for waiver of constitutional rights. It would effectively abdicate to psychological experts important questions of constitutional law. Whether the defendant

had the capacity to waive all kinds of constitutional trial rights is not at issue since he need only have been aware of the right he was waiving and the consequences of waiving it. See Moran v. Burbine, 106 S.Ct. 1135, 1141 (1986). What a defendant must know and waive in order to remove the presumption that he was compelled by custodial interrogation to incriminate himself is contained in the Miranda warnings, which were designed for that purpose. Moran v. Burbine, 106 S.Ct. at 1142. Because all of the evidence in the record indicated that the defendant's capacity to understand his Miranda rights was not affected by his mental disorder, the trial court held only that auditory hallucinations deprived him of a meaningful choice and his waiver was therefore involuntary (J.A. 48-49).

Unless the term "voluntary" as applied to waiver of a known constitutional right takes into account influences on a defendant's will not taken into account by the due process voluntariness standard, this court's resolution of the first question on appeal should also resolve the second.

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Supreme Court, U.S.
FILED
MAR 28 1986
CLERK

No. 85-660 (12)

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF COLORADO, PETITIONER

v.

FRANCIS BARRY CONNELLY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires the suppression of respondent's inculpatory statements even though the statements were volunteered to the police by respondent and were not in any way the product of coercive police conduct.

2. Whether respondent's mental condition rendered his waiver of *Miranda* rights ineffective.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The questions in this case are whether respondent's inculpatory statements are admissible under the Due Process Clause and whether respondent effectively waived his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The basic issue underlying both questions is whether respondent's delusion that he was compelled to confess bars the use of his statements as evidence, even though the police officers did not in any way induce respondent to provide this inculpatory information or to waive his *Miranda* rights. This Court's analysis and resolution of these questions is likely to have an effect upon the conduct of federal law enforcement agents in receiving voluntary inculpatory statements and the admission of such statements in federal criminal prosecutions.

STATEMENT

1. On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was walking in uniform

on a street in downtown Denver, Colorado. Respondent approached Officer Anderson and "stated * * * that he had killed someone and wanted to [talk to Officer Anderson] about it." Tr. 7; Pet. App. A4. Officer Anderson advised respondent of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and respondent indicated that he understood his rights. Officer Anderson searched respondent for weapons, placed him in handcuffs, and took respondent into a store. Respondent then told Officer Anderson "that he had killed a girl he had been traveling with near the area of West Mississippi Avenue." Pet. App. A4-A5; Tr. 10-12.

Officer Anderson testified that he first thought respondent "was some sort of a crackpot" because individuals who volunteer information regarding criminal activity "sometimes [are] under the influence of drugs or alcohol or some type of thing like that" (Tr. 8, 9). However, respondent did not exhibit any indicia of drug or alcohol use and Officer Anderson stated that respondent's neat "manner of dress and his demeanor didn't coincide with my feelings that he might be mentally unstable * * * or under the influence of alcohol or drugs" (*id.* at 10).

Officer Anderson asked respondent for a piece of identification that would verify respondent's name and address. Respondent indicated that he had a driver's license, and Officer Anderson took the license, telephoned the National Crime Information Center, and ascertained that no warrants for respondent's arrest were outstanding. Officer Anderson also telephoned the Crimes Against Persons Division of the Denver Police Department to determine whether an unsolved crime matched the murder described by respondent. Detective Stephen Antuna of the Crimes Against Persons Division advised Officer Anderson to detain respondent until Detective Antuna could get to the scene. Tr. 11-13.

While awaiting Detective Antuna's arrival, Officer Anderson again advised respondent that he had a right to remain silent. Respondent stated that "it was all

right, that he would talk to [Officer Anderson] because his conscience had been bothering him, and he felt he had to come back to Denver." Tr. 16. Officer Anderson asked whether respondent had been using drugs or alcohol and whether he had been treated for any mental disorder. Respondent replied that he had not used drugs or alcohol but that he had been confined in several mental hospitals. Tr. 14.

Detective Antuna arrived and took custody of respondent, removed the handcuffs from respondent, and placed respondent in his police car. He advised respondent of his *Miranda* rights and asked respondent "to tell me what he had on his mind." Tr. 24. Respondent replied that "he wanted to confess to a murder of a young Indian female" and gave Detective Antuna the name of the murder victim. Pet. App. A4-A5; Tr. 24-25. Detective Antuna then transported respondent to the police station.

The officers began examining police department records in an effort to identify the crime described by respondent; they ascertained that the body of an unidentified female had been discovered in April 1983 (Tr. 25, 84). Detective Antuna subsequently asked respondent to repeat his statement for another police officer. Respondent did so, and "openly came out and told us that he would be glad to show us where it happened" (Tr. 27). Respondent and the police officers entered a police car and respondent guided the officers to a building in the industrial area of Denver; he appeared "frightened [and] * * * upset," and stated that he "had stabbed the Indian female, and that he had left her there, and * * * covered her up with a mattress." Tr. 31; see also Pet. App. A5-A6; Tr. 25-32. Respondent subsequently told the officers that he had met the murder victim in Boston and that "he had only known her a few days before they decided to go traveling around the United States" (Tr. 32-33). He indicated that the murder had been committed in November or December 1982 (*ibid.*).

2. Respondent was charged with second degree murder. He initially was declared incompetent to stand trial, but after six months of treatment he was found competent to be tried. Defendant moved to suppress his inculpatory statements on the ground that he was mentally incompetent at the time he confessed. He contended that his confession was involuntary and that his mental condition precluded an effective waiver of his *Miranda* rights. Pet. App. A2-A3.

A court-appointed psychiatrist testified at the suppression hearing that respondent had told him that on the afternoon of August 17, 1983—the day before he made his inculpatory statements—respondent "began experiencing God's voice telling him to go to Denver and confess the alleged crime to a policeman" (Tr. 52). Respondent told the psychiatrist that he acted on those thoughts by withdrawing money from his bank account and taking a plane from Boston to Denver. Respondent stated that he was ambivalent about confessing but that the voice, which respondent described as "God's voice," then told respondent that "[h]e could either confess or he could kill himself" (Tr. 53). Respondent told the psychiatrist that "he felt that he didn't have much of a choice. The voice told him to go get a razor blade to kill himself. He made it quite clear he did not want to kill himself, and the other option he saw was to confess" (*ibid.*).

The psychiatrist concluded that respondent suffered from chronic schizophrenia and had experienced "command hallucinations" at the time he made the inculpatory statements. The psychiatrist stated that when a person experiences a command hallucination, he "feels as if [he has] to act on whatever the voice is telling [him]. * * * [A] command hallucination * * * really affects his volitional abilities; that is, his ability to make free and rational choices." Tr. 56. Thus, in the psychiatrist's opinion, respondent's illness "did not significantly impair his cognitive abilities, * * * for example * * * when he was read his *Miranda* rights, he probably had the capac-

ity to know that he was being read his *Miranda* rights, and he had certain rights, but * * * I think he wasn't able to use that information because of the command hallucinations that he had experienced" (Tr. 56-57).

The trial court granted the motion to suppress (Tr. 83-90). The court specifically found that "Officer Anderson used no threats, force, coercion or tricks to get the information that was given to him by [respondent]" and that Detective Antuna did not employ "promises or inducements [or] * * * threats" in his conversations with respondent (Tr. 83-84). It concluded that "legally * * * there was nothing untoward in what the police did in receiving and recording [respondent's] comments to them" (*id.* at 86).

The court nonetheless held that respondent's statements should be suppressed under the Due Process Clause. It concluded that this Court's decisions did not require that "there has to be something done by the police in order to make [a] confession [subject to suppression as] involuntary" (Tr. 88). It found that respondent's statements were inadmissible because respondent "did not exercise free will in choosing to talk to the police. He exercised a choice * * * mandated by auditory hallucination, [that] had no basis in reality, and [was] the product of a psychotic break with reality. [Respondent] at the time of the confession had absolutely in the Court's estimation no volition or choice to make. He was compelled by his illness to do that which he did" (Tr. 88-89).

The court also held that respondent did not effectively waive his *Miranda* rights. It concluded that respondent's waiver was invalid because it was a "product of his psychosis" in that respondent "would sign anything, he would do anything to follow the mandate of God to confess because his only alternative was to kill himself, and he did not choose to do that" (Tr. 89).

3. The Supreme Court of Colorado affirmed by a divided vote. The majority stated that "[t]he ultimate test of [the] voluntariness [of a confession] is whether the statement was the product of a rational intellect and

a free will. If the statement was a product of an essentially rational and free choice by its maker, then it may be used against him at trial; if it was not, the admission of the statement at trial offends due process of law" (Pet. App. A17-A18 (citations omitted)). The court observed that "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure" (*id.* at A19).

With respect to the present case, the court observed that the medical testimony "established that [respondent] on this occasion was suffering from a serious mental disorder which placed him in the dilemma of confessing his crime to the police or committing suicide" (Pet. App. A21). On the basis of this evidence, the supreme court approved the trial court's determination that respondent's initial statement to the police officer "was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action" (*id.* at A21-A22).

The Colorado Supreme Court also upheld the suppression of respondent's subsequent inculpatory statements on the ground that respondent did not validly waive his *Miranda* rights. It found that the medical testimony "clearly established that [respondent's] mental condition on August 18, 1983, was such that he was incapable of making an intelligent and free decision" to relinquish his rights (Pet. App. A23).

Two justices dissented in part. They found that "a statement can be suppressed as involuntary only if it has been extracted by police questioning or obtained through improper external force. * * * Statements which a defendant volunteers independent of police questioning or external force should not be subject to suppression under the fifth amendment." Pet. App. A3 (Erickson, J., concurring in part and dissenting in part) (citation omitted). The dissenting justices observed that respondent's

statements were "not tied to police questioning or external pressures of any kind" and that "[t]he 'internal voices' that compelled his confession were part and parcel of his own psychological makeup" (*id.* at A3-A5). Thus, "[w]hile [respondent's] mental condition may be introduced at trial to attack the credibility of his confession or to establish nonresponsibility for the crime committed, [respondent's] mental illness should not preclude a finding that his statement was voluntary for purposes of the fifth amendment" (*id.* at A5). The dissenting justices concluded that the contrary rule adopted by the majority "essentially requires police officers to close their eyes and ears when openly approached with evidence that a crime has been committed" (*id.* at A5-A6).

SUMMARY OF ARGUMENT

A. This Court long has held that the Due Process Clause bars the admission of a confession into evidence only when the confession is the product of government coercion; "the Court's analysis has consistently been animated by the view that * * * *tactics for eliciting inculpatory statements* must fall within the broad constitutional boundaries imposed by the * * * guarantee of fundamental fairness." *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), slip op. 5 (emphasis added). The conduct of the police officers in this case plainly did not run afoul of this prohibition. Since respondent volunteered his statements to the police officers, the statements cannot even be considered to be the result of police questioning, let alone the product of fundamentally unfair interrogation techniques.

This Court should reject the novel conclusion of the Colorado Supreme Court that the Due Process Clause contains an additional rule barring the admission into evidence of a defendant's inculpatory statement whenever the statement is not the product of the defendant's "free will." Society should not be required to close its

eyes to highly probative evidence volunteered to the police simply because the decision to provide the evidence is found to result from a clouded exercise of judgment by the defendant. Indeed, the sole effect of such a rule would be to protect a defendant's "right" to withhold evidence in order to escape detection—the only interest that conceivably could be served by suppressing information volunteered to the police. Accordingly, the use of such evidence at trial plainly does not "shock the conscience" in the manner required to establish a violation of the Due Process Clause.

Moreover, any such free will standard would be extremely difficult to apply. Defendants undoubtedly would seek to suppress their confessions on the grounds that they suffered from a mental disability at the time they confessed, or were under the influence of drugs or alcohol, or because overwhelming remorse clouded their exercise of free will. And nothing in the Colorado Supreme Court's opinion indicates that this new constitutional requirement would apply only to an individual's statements to the police. Since its rationale is entirely detached from government misconduct, suppression would be required of, for instance, an inculpatory letter sent to the police or even the defendant's oral statements to private individuals, if they were not products of the defendant's free will. Nothing in the Constitution warrants such an arbitrary and irrational elimination of highly probative evidence from the truth seeking process.

B. This Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), similarly provides no basis for suppressing respondent's statements. As a threshold matter, *Miranda*'s procedural protections do not appear to be implicated here because respondent was not subjected to "custodial interrogation." Respondent initiated discussions with the authorities by approaching Officer Anderson and announcing his decision to confess. The record indicates that the officers' "questions" basically consisted of nothing more than demonstrations of will-

ingness to listen to what respondent had to say and requests that respondent repeat his initial statement. Since the impetus for communication plainly derived from respondent, the officers' generalized questions could not have imposed the additional pressure to speak that must be present before the *Miranda* protections apply.

In any event, the police officers did administer the *Miranda* warnings to respondent, respondent stated that he understood the warnings, and respondent decided to respond to the officers' requests that he repeat his initial statement. These facts demonstrate that respondent effectively waived his *Miranda* rights. This Court recently stated that the inquiry into the validity of a *Miranda* waiver involves two separate issues; the circumstances must reveal "both an uncoerced choice [by the defendant to waive his *Miranda* rights] and the requisite level of comprehension [of those rights]." *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 7. The only possible question regarding the validity of the waiver here is whether respondent's decision was invalid as coerced because it was a product of his mental delusion. But the privilege against compelled self-incrimination, like the Due Process Clause, protects a citizen against only *government* coercion. Since respondent's waiver was not the product of pressure by the police officers—but stemmed from his internal compulsion to confess—respondent's waiver of his rights should be found effective. Interpreting *Miranda* to render respondent's waiver ineffective and require the suppression of his inculpatory statements in these circumstances—where the absence of government coercion guarantees that the statement could not have been obtained in violation of the privilege against compelled self-incrimination—"would ignore both *Miranda*'s mission and its only source of legitimacy." *Moran* v. *Burbine*, slip op. 11.

ARGUMENT

RESPONDENT'S UNCOERCED STATEMENTS SHOULD NOT BE SUPPRESSED

Respondent approached a police officer on a street in Denver, Colorado, and confessed that he had committed a murder. After being taken into custody, respondent willingly disclosed additional information about the crime, including the name of the victim and the location where she was slain. The courts below specifically found that these inculpatory statements did not in any way result from police coercion or trickery; indeed, the officers punctilious concern for respondent's rights is demonstrated by the fact that they several times advised respondent in accordance with the dictates of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and respondent indicated that he understood those rights. Against this background, it confounds common sense and distorts the important values embodied in the Constitution to hold that admission of respondent's inculpatory statements into evidence is prohibited. The limitations upon police interrogation established by this Court's decisions interpreting the Due Process Clause and the privilege against compelled self-incrimination rest upon the basic determination that society will not tolerate the conviction of a defendant on the basis of statements elicited through coercive conduct by government officials. Since, as the trial court concluded, "legally * * * there was nothing untoward in what the police did in receiving and recording [respondent's] comments to them" (Tr. 86), these constitutional limitations plainly are not implicated here.

The question in this case is whether the Court should adopt a new constitutional rule designed not to insulate citizens from government pressure, but to protect them from any self-generated compulsion to reveal information to the authorities.[1] Thus, the Colorado Supreme

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[1] In fact, there is no logical basis for limiting the Colorado Supreme Court's new exclusionary rule to statements made to police or other public officials, since the rule does not in any way

Court upheld the suppression of respondent's inculpatory statements on the ground that respondent's mental condition limited his ability to exercise his "free will" in deciding whether to confess. We submit that nothing in the Constitution renders the admissibility of a defendant's confession dependent upon the defendant's subjective reasons for deciding to confess. So long as coercive government pressure did not cause the confession, the defendant's reasons for confessing are constitutionally irrelevant. Moreover, a rule requiring trial courts to evaluate the motive of every defendant who chooses to confess would be quite difficult to apply in practice, and undoubtedly would exact a severe toll upon law enforcement efforts by requiring the withdrawal of highly probative evidence from the truth-seeking process.[2]

A. The Due Process Clause Prohibits The Admission Into Evidence Of A Defendant's Statement Only If The Statement Is A Product Of Government Coercion

The purpose of the Due Process Clause is " 'to secure the individual from the arbitrary exercise of the powers

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depend on a causal link between the statements and any governmental action. A drunk's confession in a barroom to a bank robbery or the statements of a rapist who called his victim after the crime, if not the product of free will, also would presumably have to be suppressed.

[2] This case concerns only the constitutional limitations upon the admissibility of a defendant's statement. Rules of evidence also may affect the admissibility of statements or other testimony of mentally incapacitated persons, although modern rules generally permit the introduction of such evidence, leaving its weight to be evaluated by the jury. Thus, Rule 601 of the Federal Rules of Evidence provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." The advisory committee note states that "[n]o mental or moral qualifications for testifying as a witness are specified. * * * Discretion is regularly exercised in favor of allowing the testimony. * * * The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence." See 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[01], at 601-09 to 601-10 (1985); *id.* ¶ 601[03], at 601-25 to 601-28.

of government.'" *Hurtado* v. *California*, 110 U.S. 516, 527 (1884) (citation omitted); see also *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). As this Court recently observed with reference to the substantive content of due process, "by barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being 'used for purposes of oppression.'" *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986), slip op. 5, quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855); see also *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 18 (citation omitted) (the "fundamental fairness" guaranteed by due process requires condemnation of police conduct that is "violative of canons fundamental to the '"traditions and conscience of our people"'"); *Chambers* v. *Florida*, 309 U.S. 227, 236-241 (1940); *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889). Respondent's inculpatory statements indisputably were not the result of the coercive application of government authority, and the use of his statements at trial would not otherwise violate fundamental fairness. The Due Process Clause therefore does not prohibit the admission of the statements into evidence.

1. Since its decision 50 years ago in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), this Court has found within the Due Process Clause of the Fourteenth Amendment the basic principle that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned" as violations of due process. *Miller* v. *Fenton*, No. 84-5786 (Dec. 3, 1985), slip op. 5. The Court observed in *Brown* that "[t]he due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (297 U.S. at 286 (citation omitted)). It held that the admission into evidence of the confessions in that

case violated due process because "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions" (*ibid.*).

A focus upon whether government agents used unfair interrogation methods has been the hallmark of this Court's due process decisions in the confession context. In *Rogers* v. *Richmond*, 365 U.S. 534 (1961), for example, the Court stated that convictions may not be based upon confessions that are "involuntary, *i.e.*, the product of coercion, either physical or psychological," because "the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Id.* at 540-541; see also *Haynes* v. *Washington*, 373 U.S. 503, 513-515, 519 (1963); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959).[3] Indeed, the Court observed in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that "the admissibility of a confession in a state criminal prosecution" is determined by reference to the Fifth Amendment standard applicable in federal prosecutions—whether "the person * * * [was] compelled to incriminate himself" (*id.* at 7).

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[3] See also *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (the due process standard reflects an accommodation between the need for effective law enforcement and "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice"); *Lego* v. *Twomey*, 404 U.S. 477, 485 (1972) ("[t]he use of coerced confessions * * * is forbidden because the method used to extract them offends constitutional principles"); *Miranda* v. *Arizona*, 384 U.S. at 464-465 (footnote omitted) (the due process standard "encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice"); *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 348 (1963) ("[a] coerced confession claim * * * always involves this question: did the governmental conduct complained of 'bring about' a confession 'not freely self-determined' "); *Reck* v. *Pate*, 367 U.S. 433, 442 (1961) ("overbearing police tactics"); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154-155 (1944) (indicating that "unrestrained [government] power" is the evil apprehended by the prohibition upon coerced confessions).

The Fifth Amendment privilege is violated only when a citizen is compelled to speak as a result of government coercion. *United States* v. *Washington*, 431 U.S. 181, 187 (1977); see page 27, *infra*. The role of the due process protection therefore also must be to guard the public against the coercive use of government power to secure an admission of guilt.

The Court confirmed this conclusion earlier this Term, observing that "the admissibility of a confession [under the Due Process Clause] turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller* v. *Fenton*, slip op. 12 (emphasis in original). Thus, "[a]lthough [the Court's] decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' the Court's analysis has consistently been animated by the view that * * * *tactics for eliciting inculpatory statements* must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." *Id.* at 5 (citation omitted; emphasis added); see also *Moran* v. *Burbine*, No. 84-1485 (Mar. 10, 1986), slip op. 33 & n.62 (Stevens, J., dissenting).

The Colorado Supreme Court seized upon this Court's use of the term "involuntary" in describing the test for the admissibility of a confession under the Due Process Clause, and mistakenly concluded that a confession that is not the product of "rational judgment and free choice" must be suppressed even in the "absence of police coercion or duress" (Pet. App. A19). It believed that this conclusion derived from *Blackburn* v. *Alabama*, 361 U.S. 199 (1960), and *Townsend* v. *Sain*, 372 U.S. 293 (1963), but in each of those cases the presence of police questioning as the factor inducing the defendant's confession was an essential element in this Court's determination that

the confession was inadmissible under the Due Process Clause.

In *Blackburn*, the defendant introduced evidence that he was mentally ill at the time he confessed, but this Court's decision that the confession should have been suppressed did not rest solely upon that fact. The Court observed that the defendant was subjected to an "eight- to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers," that neither the defendant's family nor his legal counsel was present, and that the confession was written by the police rather than by the defendant (361 U.S. at 207-208). Thus, the Court's decision that the confession was obtained in violation of due process cannot be divorced from the fact that it was produced by coercive government questioning.

Similarly, in *Townsend* v. *Sain*, *supra*, the Court applied the rule that "[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible." 372 U.S. at 308 (emphasis in original; footnote omitted). The defendant in that case—who was a heroin addict—was interrogated while under the influence of drugs administered by the police to alleviate the defendant's withdrawal symptoms, but which also had the effect of reducing the recipient's will to resist interrogation; the Court held that the confession resulting from the police questioning was inadmissible under the Due Process Clause. The Court subsequently characterized *Townsend* as a case in which the defendant was found to have succumbed "[i]n [an] incommunicado police-dominated atmosphere" (*Miranda* v. *Arizona*, 384 U.S. at 456).

Thus *Blackburn* and *Townsend* simply are examples of the basic principle that the potential coercive effect of police conduct must be determined by reference to the circumstances of each particular case, including the condition of the defendant. If the defendant's condition renders him more susceptible to coercion, a lesser degree of

pressure by the police will be deemed an impermissible technique for extracting a confession, and any inculpatory statement resulting from the use of such a technique will be inadmissible under the Due Process Clause. See *Mincey* v. *Arizona*, 437 U.S. 385, 399 (1978) (defendant lying in a hospital bed in a weakened condition was "unable to escape or resist the thrust of [the police officer's] interrogation"; confession held inadmissible under Due Process Clause).[4]

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[4] The most difficult question would arise when the suspect has a weakness or susceptibility not known to the police but in fact making him especially vulnerable to some otherwise permissible form of interrogation. While *Townsend* suggests that a police motive to exploit a suspect's weakness is not necessary for a due process violation, that was a case in which the authorities should have known of the likely effect of administration of the "truth serum." The question whether a due process violation can be established only when the police knew or should have known that their interrogation tactics were improper is not presented here because, as we discuss below, respondent's statements did not result from police questioning of any type. However, the issue does arise from time to time.

For example, in *United States* v. *Murphy*, 763 F.2d 202 (6th Cir. 1985), cert. denied, No. 85-5350 (Jan. 13, 1986), a police officer used a dog to assist in searching a wooded area for two bank robbers. The dog apprehended one of the defendants by biting him and dragging him out from beneath a tree; the defendant spontaneously and unexpectedly confessed to the bank robbery in the course of asking the police officer to call off the dog. 763 F.2d at 204. The court of appeals found that the police officer acted properly in using the dog to apprehend the defendant and that the officer did not " 'intend' to elicit [the defendant's] statements" (*id.* at 205). The court of appeals nonetheless concluded that the admission in evidence of the defendant's inculpatory statements violated the Due Process Clause on the ground that the statements were the product of the coercive effect upon the defendant of the use of the police dog. (The conviction was nevertheless affirmed on the ground that the admission of the statements was harmless error.)

As we noted in our brief in opposition in *Murphy* (at 5-7), we believe that the court of appeals erred in finding a due process violation on the facts of that case. (We have served counsel with our brief in opposition in *Murphy*.) Since the police officer's con-

Here, of course, there was *no* police conduct that could in any way be characterized as coercive or improper. Nor was respondent's willingness to speak in any way caused by police conduct, proper or improper. Respondent's initial statement admitting his complicity in the murder was volunteered to a police officer on the street; his subsequent statements were simply responses to requests that he repeat his story. Indeed, the trial court specifically found that respondent's statements were not the result of coercion, promises or inducements by the police officers. Tr. 84; see also Pet. App. A22. Since the police did not use any improper interrogation techniques to obtain respondent's statements, the use of those statements at trial cannot offend the Due Process Clause.

2. There is no warrant for this Court to adopt a second due process standard governing the admissibility of confessions that would require the suppression of an inculpatory statement solely on the ground that—due to the defendant's mental condition, drug or alcohol use, or other inner compulsion—the statement was not the product of the defendant's "free will." The Court recently affirmed that in order to constitute a due process violation the challenged government conduct must "so shock[] the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Moran* v. *Burbine*, slip op. 19; see also *Rochin* v. *California*, 342 U.S. 165, 169 (1952). The admission into

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duct was entirely proper, and the officer could not have anticipated that the use of the dog would prompt the defendant to confess, the officer's use of the dog cannot properly be classified as an "interrogation technique" that violated fundamental fairness. See *Miller* v. *Fenton*, slip op. 5. The ultimate question under the Due Process Clause is whether a citizen has been the victim of an abuse of government power, and it therefore is appropriate to evaluate the fairness of interrogation techniques in light of the facts known to the officers at the time the confession is obtained. A police officer whose actions are appropriate in light of the facts of which he is aware or should have been aware cannot be deemed to have abused his governmental authority in the manner prohibited by the Due Process Clause.

evidence of a defendant's uncoerced inculpatory statement does not come close to meeting this standard.

As a general matter, of course, there is nothing shocking or even improper about the use in evidence of a defendant's uncoerced inculpatory statements; "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States* v. *Washington*, 431 U.S. at 187; see also *Haynes* v. *Washington*, 373 U.S. at 515; *Culombe* v. *Connecticut*, 367 U.S. 568, 571 (1961) (opinion of Frankfurter, J.). The goal of law enforcement is to catch persons who commit criminal acts, and admissions of guilt are "essential to society's compelling interest in finding, convicting and punishing those who violate the law" (*Moran* v. *Burbine*, slip op. 12).

Society should not be required to forgo the use at trial of this highly probative evidence simply because a defendant's decision to confess is attributable to a self-generated compulsion rather than the defendant's "free will." The only possible "unfairness" that could result from the admission of such a confession into evidence is that the defendant may thereby—without voluntarily choosing to do so—lose his best chance to avoid detection or conviction for his crime. But that sort of "unfairness" does not infringe upon an interest worthy of protection under the Constitution. Law enforcement is not a sporting contest in which a criminal must be accorded a fair chance to outwit the police so that he may remain at large. When the government did not bring about the disability that caused the defendant's confession, there is no justification for requiring the police to ignore highly probative evidence of criminal activity that is *volunteered* by the defendant. After all, the defendant will not be punished for his decision to confess, but only for any crime he is found to have committed.

Upon close analysis, it is impossible to distinguish the application of this "free will" rationale in the instant case from other situations in which a finding of a due process violation would appear bizarre indeed. For example, a criminal could suffer from an irresistible com-

pulsion to write letters to the police providing clues regarding his crimes. Such letters undoubtedly would constitute valuable evidence both because of the information they contained and because handwriting analysis and other investigatory techniques might be used to identify the perpetrator. But under a "free will" due process standard the letters would be subject to suppression because they stemmed from the defendant's compulsion and were not a product of his free will. Similarly, suppose a robber, being chased by the police, stumbles while leaving the scene of a robbery and accidentally drops a gun bearing his fingerprints. The availability of that evidence for use in court would not be a product of the defendant's "free will," yet no one could seriously contend that its introduction at trial would offend due process requirements. Or suppose the robber gets drunk at a tavern and tells the bartender about the robbery. Intoxication may have deprived him of the ability to monitor and control his statements, but surely the bartender could nevertheless testify to what he had heard.

Even if the use by the government of a defendant's confession could be viewed as in some sense unfair on the ground that the confession did not result from the defendant's exercise of his free will, it could not rise to the level of fundamental unfairness violative of due process. The Due Process Clause generally has been applied to prevent wrongful and oppressive conduct initiated by the government that unfairly victimizes other participants in the criminal justice system. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) (vindictive sentencing); *Brady* v. *Maryland*, 373 U.S. 83 (1963) (withholding evidence requested by defendant); *Rochin* v. *California*, *supra* (oppressive investigative techniques). The use in evidence of a confession that is not the product of a defendant's free will differs from the conduct condemned in these cases because it does not involve the exercise of oppressive government power. Indeed, a rule requiring the suppression of a confession in the circumstances presented here would not be designed to avoid

government oppression; its goal would be to protect a defendant against the consequences of his own independent decision to confess. The decision not to afford defendants this sort of self-protection measure does not "shock[] the sensibilities of civilized society" (*Moran*, slip op. 19) in the manner required to justify the suppression of a confession under the Due Process Clause.[5]

Moreover, a rule under which the admissibility of a confession depended upon the extent to which the defendant exercised his free will could have extremely broad ramifications. The benefit of such a rule would not necessarily be limited to persons who were legally insane at the time they confessed. Here, for example, the trial court suppressed respondent's statements even though it expressly declined to find that respondent was insane at the time the statements were made (Tr. 87). Volunteered statements of persons under the influence of alcohol or drugs also might be deemed inadmissible under such a rule. Similarly, a defendant whose religious beliefs led him to believe that he would endure eternal suffering unless he confessed or a defendant who confessed because he was overcome by sudden remorse for his criminal act would argue that they were entitled to the suppression of their confessions on the ground that their decisions to confess were not "rational." Thus, dividing confessions into those statements that may be considered

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[5] Furthermore, unlike improper police questioning, which can be identified by police officers and therefore may be deterred by a rule requiring the suppression of coerced confessions, a suspect's mental disability might not be apparent to police officers at the time the inculpatory statement is volunteered. In this case, for example, Officer Anderson was not likely to have known that respondent was suffering from "command auditory hallucinations" at the time he made his inculpatory statement. Thus, the police investigation probably would proceed on the assumption that the suspect's statement was admissible, and the police would attempt to develop additional information on the basis of the statement. If the statement later was suppressed because it was not the product of the suspect's "free will," the entire police investigation could be compromised.

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products of a "free will" and those that cannot would pose an extremely difficult problem. The philosophical debate over the nature of free will might well become a staple of the suppression hearing.

Finally, because the nature of any such internal disability would be peculiarly within the knowledge of the defendant, it might be extremely difficult to adjudicate claims that confessions should be suppressed on this basis. What can be stated with certainty is that such a new due process right would proliferate litigation in connection with the admissibility of defendants' inculpatory statements.

B. *Miranda* Does Not Require The Suppression Of Respondent's Statements

The rules established by this Court in *Miranda* v. *Arizona*, *supra*, are designed to ensure that government compulsion does not influence a suspect's decision whether to answer the questions posed by police officers during interrogation. The *Miranda* Court determined that a suspect's privilege against compelled self-incrimination was threatened by the "inherently compelling pressures [of in-custody interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467). It held that in order "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored" (*ibid.*). *Miranda* prescribed "procedural safeguards" designed to accomplish this end. *Id.* at 444-445; see also *Moran* v. *Burbine*, slip op. 6. If the officers fail to apprise the suspect of his rights, or fail to obtain from the suspect a valid waiver of those rights, the suspect's statements in response to police interrogation cannot be admitted into evidence (*ibid.*).

Of course, the presumption of compulsion that is the justification for *Miranda*'s procedural safeguards plainly

is inapplicable in this case. The very mental disorder cited by the courts below as the basis for invalidating respondent's *Miranda* waiver—respondent's irresistible impulse to confess—guaranteed that respondent's decision to confess could not possibly be affected by any compulsion inherent in custodial interrogation or by the application of *Miranda's* procedural safeguards. There is thus no justification for applying *Miranda* on the facts presented here; the suppression of respondent's statements would be completely inappropriate because respondent's decision to confess could not have been affected by the factors that underlie the *Miranda* exclusionary rule. Cf. *New York* v. *Quarles*, No. 82-1213 (June 12, 1984) (declining to apply *Miranda* exclusionary rule where other considerations weighed against a strict application of *Miranda*).

Moreover, respondent was advised of his *Miranda* rights, stated that he understood those rights, and decided to confess. Since respondent's decision to waive his *Miranda* rights could not possibly have been the result of government coercion, respondent's *Miranda* waiver was valid and his inculpatory statements accordingly should not have been suppressed.[6]

1. As a threshold matter, it is not clear that *Miranda* has any application in this case because respondent's inculpatory statements do not appear to have resulted from "interrogation" as that term has been defined in the *Miranda* context.[7] The Court in *Miranda* made clear that

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[6] Regardless of the validity of respondent's waiver, respondent's first statement to Officer Anderson (see page 2, *supra*) obviously was not the product of custodial interrogation and therefore could not properly be (and was not in this case) suppressed under *Miranda*.

[7] It appears from the record that the second prerequisite for the attachment of a suspect's *Miranda* rights—that the suspect has been "taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda*, 384 U.S. at 444 (footnote omitted))—is present here. Respondent was placed in handcuffs immediately after he made his initial statement to Officer Anderson

the "procedural safeguards" prescribed in that decision apply only to "custodial interrogation"; the Court defined custodial interrogation as "*questioning initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at 444 (footnote omitted; emphasis added)). The Court also affirmed in that case that "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. * * * There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478 (footnote omitted); see also *Rhode Island* v. *Innis*, 446 U.S. 291, 298, 299-300 (1980).

Miranda thus recognizes that inculpatory statements may result from two essentially different processes, one in which the impetus for the statements comes from the suspect, the other in which it comes from the authorities. The different levels of compulsion likely to be associated with these different circumstances are important in determining whether the authorities have engaged in "interrogation" triggering the application of *Miranda*'s procedural safeguards.

A finding that a police officer has engaged in "interrogation" is appropriate when the police officer's conduct "reflect[s] a measure of compulsion above and beyond that inherent in custody itself" (*Rhode Island* v. *Innis*, 446 U.S. at 300 (footnote omitted)). The application of this standard is relatively straightforward when the suspect has not chosen to volunteer a confession. In that circumstance, ar questioning by the police most likely

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(Tr. 11) and remained under the control of the police officers during the period that he made his subsequent inculpatory statements (see Tr. 24-30).

would impose additional pressure to speak upon the suspect, and therefore would amount to interrogation. The Court in *Rhode Island* v. *Innis*, *supra*, thus concluded with respect to this situation that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police * * * that the police should know are reasonably likely to elicit an incriminating response from the suspect" (446 U.S. at 301 (footnote omitted)).

The type of police conduct that reflects compulsion—and therefore the definition of "interrogation"—necessarily differs when a suspect has volunteered a confession or otherwise spontaneously initiated discussion of the offense. At first blush, police "questioning" in connection with receipt of such disclosures might appear to be unnecessary, but, as the present case demonstrates, when a suspect volunteers a confession police officers seeking to record the confession almost certainly will be required to ask the suspect to "tell us what happened" or "what happened next," or to request that he repeat his statement for a second or third officer. Such generalized invitations to the suspect to tell his story do not transform the repetition of the suspect's voluntary confession into "questioning initiated by law enforcement officers" (384 U.S. at 444) that must be accompanied by *Miranda*'s procedural safeguards. In view of the suspect's prior decision to supply this information to the police, such general questions do not add any meaningful "measure of compulsion" (*Innis*, 446 U.S. at 300).[8]

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[8] The Court observed in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and held in *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), that a suspect who had asserted his right to counsel could later lawfully be interrogated if he initiated a renewed discussion of the offense with police officers. The *Edwards* Court stated (451 U.S. at 486 n.9) that "[i]f, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be 'interrogation.'" This statement does not undercut our conclusion that there was no interrogation in the present case. First, the Court in *Edwards* was addressing a situation in which the accused first requested an attorney and only subsequently

In this case, respondent's initial statement to Officer Anderson falls squarely within the exception for voluntary statements identified by the *Miranda* Court itself. Respondent approached Officer Anderson to "offer a confession" and repeated his confession for other police officers. See pages 2-3, *supra*. Although respondent's subsequent statements were made in response to general "questions" by police officers, these general inquiries simply could not have had the coercive effect that *Miranda* is designed to counteract. For this reason, follow-up questioning such as the questioning of respondent in this case should not be deemed to constitute interrogation that must be accompanied by the procedural safeguards set forth in *Miranda*. See 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.7(d) (1984).[9]

2. In any event, respondent effectively waived his *Miranda* rights before making his inculpatory statements to the police officers. *Miranda* itself recognized that a defendant may waive the rights described in the warnings and agree to respond to questions posed by the police "provided the waiver is made voluntarily, knowingly and intelligently" (384 U.S. at 444). This Court recently set forth a comprehensive description of the waiver inquiry:

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decided to permit interrogation; here, the police officers were following up upon a spontaneous statement that was not preceded by an assertion of rights. Second, *Edwards* does not set forth a test for determining whether police officers' generalized inquiries can amount to interrogation when the discussion is preceded by a voluntary statement. We submit that the standard described in the text properly reconciles the relevant interests.

[9] Of course, if such follow-up questioning ranges significantly beyond the bounds of the information volunteered by the defendant in his spontaneous statement, and the police begin to seek information that was not volunteered by the suspect, the police questioning would constitute interrogation regulated by *Miranda*. On the other hand, the fact that a suspect chooses to volunteer additional information in response to a general question of the type discussed above—as respondent chose to do here—would not transform the otherwise-permissible inquiry into interrogation; the suspect's decision to supply new information would not have been the result of any compulsion flowing from the character of the question posed by the police.

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. *Burbine*, slip op. 7 (citation omitted); see also *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979); *North Carolina* v. *Butler*, 441 U.S. 369, 373-374 (1979).[10]

Here, the record shows that the police officers several times administered the *Miranda* warnings, respondent stated that he understood his rights, and respondent did not assert his right to remain silent and did not request the presence of an attorney. See pages 2-3, *supra*. Thus, the police officers followed the procedures required to obtain a valid *Miranda* waiver. See *Moran* v. *Burbine*, slip op 6. Moreover, it seems clear that the second aspect of the waiver inquiry was satisfied in this case: respondent was aware of the nature of the right against compelled self-incrimination and the consequence of his decision to waive that right.[11] The sole issue here is whether respondent's waiver decision was voluntary in that it was the product of an "uncoerced choice" (*Moran*, slip op. 7).

As a threshold matter, it is clear that the content of the voluntariness standard applicable to respondent's waiver decision must be determined by reference to the interests protected by the privilege against compelled self-incrimination. See *Moran* v. *Burbine*, slip op. 10-11

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[10] The prosecution bears the burden of demonstrating the validity of the waiver. *Butler*, 441 U.S. at 373; *Miranda*, 384 U.S. at 475.

[11] Respondent told the officers that he understood his rights (Tr. 10-12, 16), and the court-appointed psychiatrist testified that respondent was capable of understanding his rights (Tr. 56-57). The courts below did not make any factual findings to the contrary.

(refusing to interpret *Miranda* to bar police deception of an attorney because such a rule would be unrelated to *Miranda*'s purpose of "guard[ing] against abridgement of the suspect's Fifth Amendment rights"); cf. *Miller* v. *Fenton*, *supra* (defining due process voluntariness standard by reference to the goal of preventing government coercion that is encompassed within the Due Process Clause).

The sole purpose of the privilege against compelled self-incrimination is to protect individuals against the use of government power to compel a confession. The Court has observed that "[a]bsent some *officially coerced* self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *United States* v. *Washington*, 431 U.S. at 187 (emphasis added); see also *New York* v. *Quarles*, slip op. 4; *Miranda*, 384 U.S. at 460 (historical development of the privilege reflected "grop[ing] for the proper scope of governmental power over the citizen"). The privilege thus "is [not] concerned with moral and psychological pressures to confess emanating from sources other than official coercion" (*Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985), slip op. 6).[12]

Since *Miranda*'s only purpose is to safeguard the privilege against compelled self-incrimination by counteracting the coercive aspects of custodial interrogation, a waiver should be deemed voluntary within the meaning of *Miranda* when it does not result from the government coercion that the self-incrimination privilege is designed to prevent. Plainly, then, a waiver should be upheld as "the product of a free and deliberate choice rather than intimidation, coercion or deception" (*Moran*, slip op. 7) so long as the suspect's decision was not affected by government "intimidation, coercion or deception"; any impact upon the suspect's choice stemming from internal

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[12] A failure to administer the *Miranda* warnings raises a presumption of government compulsion normally requiring suppression of the suspect's statements. *Oregon* v. *Elstad*, slip op. 6; *New York* v. *Quarles*, slip op. 5 n.5.

personal, moral, or psychological pressures is simply irrelevant. See *id.* at 7 (upholding voluntariness of waiver by noting that "the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements"); *Oregon* v. *Elstad*, slip op. 13 ("psychological impact [upon the suspect] of voluntary disclosure of a guilty secret" does not "compromise[] the voluntariness of a subsequent informed waiver").[13]

Applying some more general standard requiring an assessment of "voluntariness" by reference to a suspect's internal motivations for responding to police questioning would "cut this Court's holding in [*Miranda*] completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976). Since *Miranda* is designed to protect a suspect against *government* coercion, the existence of unrelated sources of compulsion cannot be relevant in assessing the validity of a suspect's waiver decision. Otherwise, *Miranda* would preclude the admission into evidence of inculpatory statements that could not possibly be the product of a violation of a suspect's privilege against compelled self-incrimination because, by hypothesis, the statements would not have resulted in any way from government coercion. A waiver standard that provided a suspect with protection against a self-generated compulsion to confess thus "would ignore both *Miranda*'s mission and its only source of legitimacy." *Moran*, slip op. 11; cf. pages 18-20, *supra*.[14]

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[13] Although this Court has described the suspect's decision whether to waive his rights as "an 'act of free will'" and observed that "[o]nce warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities" (*Oregon* v. *Elstad*, slip op. 10, 12 (citation omitted)), the Court never has indicated that a suspect's self-generated compulsion to confess could disable him from effectively waiving his rights.

[14] A different standard of voluntariness might well apply where the right being waived protects the individual against internal compulsion as well as government coercion. For example, the voluntariness of a guilty plea would depend upon the absence of internal as well as government coercion.

In its recent decision in *Moran* v. *Burbine*, the Court refused to interpret *Miranda*'s procedural safeguards in a manner that could alter "the subtle balance struck in that decision" between society's interest in law enforcement and the need to protect a suspect from "constitutionally impermissible compulsion" (slip op. 12). The Court observed that the procedural requirement suggested by the defendant in that case would contribute "only incidentally, if at all" to the protection of a suspect's privilege against self-incrimination and would exact "a substantial cost [in terms of] society's legitimate and substantial interest in securing admissions of guilt" (*id.* at 13). So here, the *Miranda* waiver standard should not be construed in a manner that would impose an "additional handicap on otherwise permissible investigatory efforts" (*ibid.*) when that handicap would be completely unrelated to—and unnecessary for—the protection of a suspect's privilege against compelled self-incrimination.

The Court in *Moran* also rested its decision on the "overriding practical consideration[]" that the rule suggested by the defendant would "have the inevitable consequence of muddying *Miranda*'s otherwise relatively clear waters" (slip op. 11). The waiver standard for which we contend would permit courts to assess the validity of a *Miranda* waiver by utilizing precedents developed in applying the Due Process Clause voluntariness standard governing the admissibility of confessions. Requiring consideration of a suspect's internal motivations, on the other hand, would force courts to confront complex and uncertain issues of "free will" in order to evaluate the propriety of a *Miranda* waiver, and make it difficult for police officers to predict in advance whether a suspect's waiver would be upheld. See page 20, *supra*. For all of these reasons, the voluntariness of a suspect's decision to waive his *Miranda* rights should be assessed solely by determining whether or not the waiver decision was a product of government compulsion.

The facts in this case make clear that respondent's decision to waive his *Miranda* rights could not have been

affected by government pressure. The courts below concluded that respondent's waiver was ineffective because respondent's mental delusion compelled him to waive his rights and confess (see Pet. App. A23; Tr. 89). Respondent's decision to waive his *Miranda* rights accordingly could not have resulted from government coercion; respondent's compulsion ensured that he would waive his rights regardless of any pressure from the police officers. Of course, the trial court found that the officers did not exert any such pressure in obtaining respondent's waiver or his inculpatory statements (Tr. 84). Since there was no causal connection between government compulsion and respondent's decision to speak, the only possible conclusion is that respondent voluntarily—and therefore effectively—waived his *Miranda* rights.[15]

CONCLUSION

The judgment of the Supreme Court of Colorado should be reversed.

Respectfully submitted.

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MARCH 1986

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[15] The decision concerning the validity of a suspect's waiver may not always be as clearcut as in this case. For example, if the suspect's mental condition renders him *more* susceptible to suggestions by others (rather than less susceptible to such pressure as was the case here), the prosecution might find it more difficult to demonstrate that the waiver was not the result of government compulsion. Cf. pages 15-20, *supra*. In addition, other sorts of self-generated disabilities might affect a suspect's comprehension of both his *Miranda* rights and the consequences of the waiver decision, possibly rendering the waiver ineffective on the ground that the suspect did not have the "requisite level of comprehension" regarding his rights (see *Moran* v. *Burbine*, slip op. 7).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20176

No. 85-660

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF COLORADO,

Petitioner,

v.

FRANCIS BARRY CONNELLY,

Respondent.

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Nathan B. Coats, Esq., Counsel for Petitioner, and Abelardo P. Bernal, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over sixty times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's specific interest in this case arises from our concern that this Court's approval of the decision of the Supreme Court of Colorado would place an intolerable burden upon the police

to ascertain the mental condition of a suspect prior to interrogation. It would, in effect, cloak suspects with an absolute immunity from the consequences of their confessions that are motivated by feelings of guilt or pangs of conscience, and the ruling of the court below would apply even in those situations where the police have not interrogated a suspect.

STATEMENT

Briefly, the facts in this case show that the defendant simply walked up to a uniformed patrol officer on a downtown street in Denver, Colorado, and spontaneously confessed to killing a 14-year-old girl four months earlier. Defendant corroborated his confession by directing police to supporting evidence, and he confessed a second time after being advised of, and waiving his *Miranda* rights.

The Colorado Supreme Court unequivocally acknowledged that the initial confession was not coerced, elicited, or solicited in any way by the police officer or any other representatives of the State of Colorado, finding specifically that it "was neither solicited by the officer nor was the result of any form of police action." *People v. Connelly*, 702 P.2d 722, 729 (1985).

The record indicates that defendant was convinced by a direction from God—which could be but another way of indicating extreme pangs of conscience—that he should confess his crime. Although he was apparently competent to stand trial, a psychiatrist testified at a suppression hearing that defendant was a paranoid schizophrenic and had auditory hallucinations at or before the time he confessed.

The Supreme Court of Colorado ruled that the defendant's mental condition sufficed in itself to render his initial confession involuntary—despite the lack of any state involvement what-

soever in the confession. To admit such a confession, the court ruled, would violate the Due Process Clause of the Fourteenth Amendment. 702 P.2d at 729. Defendant's waiver of his *Miranda* rights was likewise rendered ineffective due to his mental condition, making his subsequent confession also inadmissible. *Id.* The court also expressed the view that the use of derivative evidence might be precluded in this case, 702 P.2d at 730, but *amici* do not address this issue in this brief, other than to note in passing that such view is clearly wrong in light of prior pronouncements of this Court in *Michigan v. Tucker*, 404 U.S. 443 (1972) and *Harris v. New York*, 401 U.S. 222 (1971).

SUMMARY OF ARGUMENT

The summary of argument has already been submitted in the "argument" section of the Table of Contents and *amici's* statement of interest.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT COMPEL SUPPRESSION OF CONFESSION BY DEFENDANT WHO, HAVING BEEN TREATED FOR MENTAL PROBLEMS, WALKED UP TO STREET PATROL OFFICER AND CONFESSED TO UNSOLVED KILLING OF YOUNG GIRL, SAID THAT GOD HAD TOLD HIM TO CONFESS, AND THEREAFTER DIRECTED POLICE TO EVIDENCE CORROBORATING CONFESSION; NOR DID DEFENDANT'S MENTAL CONDITION RENDER HIS WAIVER OF *MIRANDA* RIGHTS INEFFECTIVE.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *National District Attorneys Association, the International Association of Chiefs of Police*, various other associations of chiefs of police and sheriffs, and the *Legal Foundation of America*. Those briefs have often presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief essentially to the law enforcement impact of the issues raised by the parties.

We must, however, comment briefly on the three key cases relied upon by the court below in reaching its decision on the due process issue—*Townsend v. Sain*, 372 U.S. 293 (1963), *Culombe v. Connecticut*, 367 U.S. 568 (1961), and *Blackburn v. Alabama*, 361 U.S. 199 (1960).

Not one of these decisions of this Court stands for the proposition asserted by the court below, and *amici* respectfully request this Court to make a clear declaration to that effect for the benefit of prosecutors and police alike.

Townsend simply declared the due process voluntariness standard—a confession must be "the product of a rational intellect and a free will," but it *applied* the standard to a confession *obtained by the police*, not the sort of volunteered, spontaneous statement made by the defendant initially in this case. The Court in *Townsend* stated:

> These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement. . . . *Any questioning by police officers* which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible (emphasis added).

372 U.S. at 307.

The same is true of *Culombe*. The defendant in that case, having the mental age of a 9-year-old person, was subjected to a grueling *police interrogation* that ranged over a four day period before he confessed. And the same is true of *Blackburn*. There a psychotic was *interrogated* for eight or nine hours by a battery of up to three police officers while being confined in a "tiny room." The Court ruled: "[T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by *state officers* and introduced into evidence in a criminal prosecution that culminates in a conviction." (emphasis added). 361 U.S. at 205.

The court below clearly misapplied these cases, despite the fact that Justice Erickson, in his vigorous dissent, called attention to the misapplication. (702 P.2d at 731.) He very aptly pointed out that the defendant's motivation for confessing "was not tied to police questioning or external pressures of any kind," and that the defendant's "own psychological makeup" accounted for the "internal voices" that allegedly compelled his confession. Justice Erickson stated that although the defendant's mental condition could be considered "to attack the credibility of his confession or to establish nonresponsibility,"

his mental illness "should not preclude a finding that his statement was voluntary for purposes of the Fifth Amendment." *Id.*

A factor the Colorado court overlooked is that the principal basis for the voluntariness test of confession admissibility is the protection against the use as evidence of externally coerced, false confessions. See Inbau, Reid, and Buckley, Criminal Interrogation and Confessions, 3d ed. 1986, at pp. 246-247. In the instant case there was no coercion by anyone; moreover, the confession was clearly established to be valid and trustworthy.

The decision below not only misapplies the due process standard articulated by this Court in prior cases but it also defies all common sense, a fact that has not escaped news media attention. As noted by Vincent Carroll, assistant editorial page editor, writing for the *Rocky Mountain News* in his column, July 11, 1985, p. 71:

> Are police in Colorado now required, in addition to reading a suspect his rights, to assess the person's mental condition and refuse to investigate leads if they conclude he is unbalanced or schizophrenic?
>
> If so, why not suppress all unsolicited admissions of guilt? Isn't a conscience merely the mix of values, empathy, instinct and — yes — religious belief that compel a person to act in a socially acceptable fashion, even if it goes against his short-term interest? How is the confession of *any* guilt-stricken person entirely voluntary, in the sense that it's free of compulsion?

And as noted on the editorial page of the same newspaper of August 18, 1985, p. 80:

> It's bad enough that some offenders already escape lengthy incarceration through insanity pleas. At least, however, they're put away in mental hospitals after a trial. This case adds an ugly twist to defense lawyers' options: As Deputy District Attorney Gilberto Espinoza says, "If this (ruling) stands, we may never be able to use any confession if an individual said he felt a compulsion to confess for whatever reason."

Amici submit that the case below demonstrates the need for a bright line statement from this Court that the due process standard for voluntariness applies to *state action*, or to the conduct of *third parties* (as in the case of a confession coerced by a private security guard, for example), not the results of mental delusions or pangs of conscience demonstrated by a defendant such as the one in the instant case.

The potential problem the Colorado court creates for prosecutors is a substantial one. Assume, for instance, that a defendant has been found competent to stand trial, and also assume a determination has been made that he was sane at the time he committed the act. Then further assume that there was psychiatric testimony to the effect that his confession resulted from "paranoid schizophrenia," or from "command auditory hallucinations," or from some other mental illness. If the psychiatric appraisal of his confession is accorded the weight that was given in the instant case, by a reviewing court, this would mean that in at least some cases a defendant will have been fully immunized from the consequences of his act and his damning confession. Absent independent evidence of his guilt, there could be no legal conclusion to that effect. Neither the traditional standard of voluntariness developed by this Court over many decades, nor the purpose of the prophylactic rule adopted by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), for the protection of the Fifth Amendment privilege against self-incrimination, requires so manifestly untenable a result as this.

Amici submit that the police will not be able to sort out the "insane" from the "guilt ridden," even if they thought that was their responsibility, and prosecutors will in many cases be left with cases where the defendant cannot even be civilly committed in the absence of a finding of incompetency or an acquittal by reason of insanity. It is obviously advisable for this Court to issue another "bright line" rule—one that will deal

with the aberration represented by the decision of the court below—as the Court has done in recent years in Fourth Amendment cases where state and federal courts had strayed from constitutional mandates into a complexity of rules that were not only unworkable for police and prosecutors, but also baffling and discrediting to the criminal justice system as perceived by the public, and far removed from the intent of the Framers of the Constitution, e.g., *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Ross*, 456 U.S. 798 (1982). We submit that the instant case is an appropriate vehicle for this Court to continue that salutory process.

CONCLUSION

The Colorado Supreme Court decision now before this Court is not only in error in its misapplication of prior due process decisions of this Court, but it is also one of many hundreds that have been spawned by *Miranda*, as was recognized by this Court when it added the *Miranda* waiver issue to the questions to be considered on review. *Miranda* cases, in particular, have consumed enormous time, effort, and expenditure of funds that could have been put to far better use on matters of considerably greater importance within the judicial system.

Not only is it to the best public interest to reject the rules established below in this case, but we urge, additionally, that at the earliest opportunity this Court should re-examine the *Miranda* mandate as to the justification for its continued existence. (An expanded explanation for this recommendation is presented in Inbau, "Over-Reaction: The Mischief of *Miranda v. Arizona*," 73 J.C.L. Crim. 797-810 (1983), and particularly in the updated and revised version in 18 The Prosecutor, No. 4, 7 (1985)). We submit that in disposing of this case the Court should restate the due process voluntariness

standard, and also clarify the *Miranda* waiver standard; moreover, the Court should examine the rationale for continuation of the *Miranda* decision itself.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-660

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF COLORADO,
Petitioner,

v.

FRANCIS BARRY CONNELLY,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER*

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (hereafter "APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. APA wishes to inform the Court about the extent to which behavioral scientists, including psychologists, can provide meaningful expert assistance in evaluating the cognitive and volitional capacities of criminal defendants. APA believes this important and relevant information will not be provided by the parties and will be of assistance to the Court in deciding this case.

Petitioner and respondent have both consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case presents questions of first impression in this Court involving the validity of confessions and of waivers of *Miranda* rights by an individual diagnosed as a paranoid schizophrenic acting in response to "command hallucinations." Specifically, the questions presented are whether, absent any claim of police misconduct, the state's use of spontaneous but incriminating statements made in a noncustodial setting by a paranoid schizophrenic acting in response to an auditory hallucination commanding him to confess, or its use of incriminating

* *Amicus* wishes to acknowledge substantial assistance in the research and preparation of this brief from Brendan A. Maher, Ph.D., Henderson Professor of the Psychology of Personality, Harvard University.

statements made subsequently by that individual in a custodial setting following a "waiver" of his *Miranda* rights, would violate the due process clause of the Fourteenth Amendment.

As discussed *infra*, Point V, in evaluating the constitutional admissibility of confessions, or the validity of waivers of *Miranda* rights, the Court has articulated a standard which, though variously phrased, requires assessment of the individual's cognitive *and* volitional capacities at the time of the confession or waiver.

The behavioral sciences, including, in particular, psychology, *can* provide meaningful assistance to the legal system in assessing individuals' cognitive capacities. Specifically, psychologists and other behavioral scientists can evaluate the effect or lack of effect of paranoid schizophrenia, and of command hallucinations, on a particular individual's cognitive capacity. Point I.A. However, because behavioral science is based on the premise that all behavior is determined, "volition" is not used or recognized by the behavioral sciences as a meaningful concept in the study of human behavior. Accordingly, the behavioral sciences can provide only very limited assistance to the legal system ir assessing the effects of paranoid schizophrenia or of command hallucinations on individuals' volitional capacities. Specifically, psychologists and other behavioral scientists can provide the legal system with *statistical* evidence of the percentage of individuals receiving command hallucinations who obey or disobey the commard. But they cannot predict whether a particular individual will obey or disobey a command hallucination. Point I.B.

Although command hallucinations are relatively common, the professional literature contains only a few references to the cognitive capacity of persons who receive and obey command hallucinations. Those references indicate, however, that the cognitive capacity of individuals who obey command hallucinations is likely to be relatively intact. It can at least be said that most individ-

uals who receive and obey command hallucinations are able to understand what they are doing, and to understand the consequences of their acts. This conclusion is consistent with the expert testimony that respondent's cognitive capacity was not impaired. Point II.

Not surprisingly, the professional literature contains no references, *per se*, to the volitional capacity of individuals who obey or disobey command hallucinations. However, based on clinical experience, it can be said that it is rare for individuals who receive command hallucinations to obey them, and extremely rare for individuals to obey command hallucinations when to do so will cause them physical harm or other significant injury. In this statistical sense, it appears that most individuals can, and do, resist auditory hallucinations commanding them to commit acts that would be physically or otherwise injurious to themselves.

Nevertheless, except perhaps in controlled, experimental conditions, which were not present in this case, psychologists and other behavioral scientists cannot determine the effect of a particular command hallucination on the behavior of a particular individual. Accordingly, when the expert testified that respondent's command hallucinations impaired his volitional capacity, he was expressing a personal opinion, not an opinion based on generally accepted and reliable scientific evidence. Point III.

Amicus believes that, in the circumstances of this case, the state's use of respondent's spontaneous precustodial confession or of the statements he made after being advised of his *Miranda* rights would not violate the due process clause. Because respondent apparently does not contest the trustworthiness of his confessions, or claim they were the result of improper official conduct, suppression of those confessions is not necessary to further either of the values protected by the due process clause in this context. Point IV.

Amicus concludes by recommending clarifications of the existing legal tests that would facilitate meaningful participation by psychologists and other behavioral scientists in evaluating individuals pursuant to those tests. Point V.

ARGUMENT

I. ALTHOUGH THE BEHAVIORAL SCIENCES CAN PROVIDE MEANINGFUL ASSISTANCE TO THE LEGAL SYSTEM IN EVALUATING INDIVIDUALS' COGNITIVE CAPACITIES, BECAUSE OF FUNDAMENTAL DIFFERENCES BETWEEN THE ASSUMPTIONS UNDERLYING THE BEHAVIORAL SCIENCES AND THE LEGAL SYSTEM, THE BEHAVIORAL SCIENCES CAN PROVIDE ONLY LIMITED ASSISTANCE TO THE LEGAL SYSTEM IN EVALUATING INDIVIDUALS' VOLITIONAL CAPACITIES.

The civil and criminal legal systems assume that, absent undue coercion, mentally healthy adults can "choose" to engage or not engage in various behaviors, or otherwise exercise "free will." Legal concepts of blameworthiness and personal responsibility depend on these assumptions.

Science relies on very different assumptions. Among the fundamental assumptions of every science (including psychology) is the assumption that the events studied in that science occur pursuant to "natural laws." Natural laws are different from man-made laws. Although man-made laws can be violated, natural laws cannot. They are assumed to be unbreakable.[1] This natural law assumption means that when any event occurs it does so because a

---

[1] See F. CARPENTER, THE SKINNER PRIMER: BEYOND FREEDOM AND DIGNITY 101 (1974):

> Man-made laws are violable; that is, they can be disobeyed. A natural law, however, such as the law of gravity, applies to all material things; it cannot be broken. Man-made laws can be broken either through ignorance of them or by deliberate action. Thus, any violable law implies a freedom, the freedom to break it.

combination of antecedent events or stimulus conditions ("causes") had made that event inevitable.[2] No event occurs in defiance of natural law (if this should occur it would, by definition, be a miracle).[3] Thus, whenever anything happens, it could not have been possible, from a scientific point of view, for it to have failed to happen, or for it to have happened in any other way. Similar responses may be evoked by different combinations of stimulus conditions, but if that particular combination of conditions were to occur again, an identical response would necessarily occur again.[4] This natural law assumption is accepted by behavioral science, and is the premise on

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[2] An event that does not directly evoke planned, desired or particular behavior is called an antecedent event. An event that does evoke particular behavior is called a stimulus. The behavior that results from a stimulus is called a response. M. TILLMAN, D. BERSOFF & T. DOLLY, LEARNING TO TEACH 125-126 (1976).

[3] Similarly, from a scientific point of view, statements that something happened "by accident," or "by chance" mean only that we do not know the full range of antecedent events that determined the event. References to "accident" or "chance," do not describe a special kind of cause, nor do they mean that something can happen without any cause; they simply indicate that we are ignorant of the actual factors that made the event inevitable.

[4] The principle that events occur pursuant to unbreakable natural laws means, in theory, that future events can be predicted based upon knowledge of antecedent events. This does not mean, however, that responses are necessarily predictable in practice. A major obstacle to actual prediction of a specific response is lack of complete information about all of the antecedent events. Another obstacle is Heisenberg's principle of indeterminacy, which states that a phenomenon or circumstance is changed by the very act of perceiving it. For this reason, "Heisenberg demonstrated that we never possess [and can never possess] more than half of the information necessary to predict the future action of an electron in an atomic orbit. . . . It is not a question of a basic limitation due to our methods of measurement or to our senses; it is a basic limitation resting on the reciprocal interaction of observation and phenomenon." LECOMTE DU NOUY, THE ROAD TO REASON 175-176 (1948).

which psychologists and other behavioral scientists base their claims to reliable knowledge about behavior.[5]

A. Volitional Capacity

Behavioral science does not use terms such as "volition," or "free will." Behavioral scientists assume that any action by living creatures, including humans, is the inevitable outcome of a set of antecedent and stimulus conditions. When individuals are placed in a situation in which several alternative courses of action are ostensibly open to them, their "choice" will be determined by the relative weight of the various antecedent and stimulus conditions that are relevant to each of the alternatives.

A second basic assumption of behavioral science is that "choices" are determined by the consequences the individual has experienced, or has observed others to experience, following similar behavior in the past. The probability that particular behavior will occur again increases when that behavior is followed by a positive (or reinforcing) consequence, or by a reduction of a negative consequence (such as pain or guilt). The probability that particular behavior will not occur again increases when that be-

---

[5] The analysis presented in this brief is based on a relatively "pure" model of behavioral science, in which all behavior is determined and there is no room for concepts such as "voluntary," or "free will." From a strictly scientific perspective, no less deterministic model is possible. However, *amicus* wishes to acknowledge that just as the law has found it necessary, in practice, to rely on concepts such as "voluntary," and "free will," it is also true that, in practice, behavioral scientists sometimes rely on similar concepts, even though such concepts are inconsistent with a strictly deterministic model. Behavioral scientists are scientists, but they are also people, and like all people their actions and relationships with others are frequently based on assumptions of personal autonomy, responsibility, and free choice that would be inconsistent with a strictly deterministic model. Similarly, concepts of autonomy and choice play a prominent role in the *professional* work of distinguished behavioral scientists. *E.g.*, R. FADEN & T. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986) (*see especially*, Chapter 7, "The Concept of Autonomy," and Chapter 10, "Coercion, Manipulation and Persuasion").

havior is followed by a negative consequence, or by no apparent consequence. This means behavioral science assumes that no individual is "free" to ignore that individual's "reinforcement history" and to "choose" the more negative consequence, any more than a falling apple is free to stop in mid-air. Different individuals do make different choices in what *appear* to be similar or identical circumstances, but that is because they have different genetic endowments and have had different environmental experiences which cause them to evaluate the positive or negative consequences of the current circumstances quite differently.[6]

From this behavioral science point of view, the difference between mental disorder and normalcy is not a difference between "determined" behavior and "free" behavior. Both kinds of behavior are "determined," as is all behavior. The behavior of mentally disordered persons is simply determined by different antecedents (perhaps genetic, perhaps physiological, or perhaps environmental) from the antecedents that determine the behavior of normal persons.

Applying these principles to this case, the behavioral scientist must assume that a particular complex of factors (some of which can only be guessed) made it inevitable that respondent would confess when he did. The scientist might guess that a religious background in which respondent was taught that confession is necessary if sin is to be forgiven, together with respondent's discomfort arising from guilt and fear of apprehension, created a situation in which confessing was less negative to respondent than was continued concealment. Presumably, individuals who confess to crimes because their "conscience is bothering them" have found, as a result of their reinforcement history, that the distress caused by concealment is more

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[6] The effects of past experience cannot be "willed" away. They can be changed by new experiences, but they cannot be changed by the action of some agency outside the cause-and-effect chain, popularly known as "free will."

aversive (unpleasant) than the anticipated consequences of confession. It is determined that they will engage in the behavior with the more positive consequences or the lesser discomfort, which, for those individuals, means confessing. Because they were not free to choose the greater discomfort, it cannot be said that their confessions were "voluntary" or an exercise of "free will."

Thus, in this sense, no behavioral scientist could express a professional opinion that respondent's precustodial and post-*Miranda* confessions were "voluntary" or were an exercise of "free will." Respondent's behavior was determined and he had no "choice" to do other than what he did. In reaching that conclusion, however, psychologists and other behavioral scientists could not assert (indeed, it would be unscientific to do so) that respondent's "will" had been overborne.[7]

Strictly speaking, the concept of coercion (insofar as it means acting under conditions that prevent "voluntary" action or the operation of "free will") has no meaning in behavioral science. A behavioral scientist can speak meaningfully of situations that have forcible constraints which effectively limit the range of behaviors engaged in by most people. Some of these constraints may be of a purely material nature, and may effectively constrain

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[7] *E.g.*, B. SKINNER, BEYOND FREEDOM AND DIGNITY 96 (1971):

> In what we may call the prescientific [or legal] view (and the word is not necessarily pejorative) a person's behavior is at least to some extent his own achievement. He is free to deliberate, decide, and act, possibly in original ways, and he is to be given credit for his successes and blamed for his failures. In the scientific view (and the word is not necessarily honorific) a person's behavior is determined by a genetic endowment traceable to the evolutionary history of the species and by the environmental circumstances to which as an individual he has been exposed. Neither view can be proved, but it is in the nature of scientific inquiry that the evidence should shift in favor of the second. As we learn more about the effects of the environment, we have less reason to attribute any part of human behavior to an autonomous controlling agent.

everyone, regardless of their differing antecedent experiences. Physical confinement, for example, would effectively limit every confined person's range of behaviors. But non-physical constraints can also limit the range of possible behaviors for most people. And some non-physical constraints may limit the range of possible behaviors almost as effectively as physical restraints.

If empirical evidence shows that the great majority of people subjected to a particular non-physical constraint exhibit a very limited range of behaviors, even though other behaviors were physically possible, it can be said that that is an effective constraint. For example, the bank teller commanded to hand over the contents of the till at pistol point is, strictly speaking, "free" to ignore that command and to risk the consequences. But because we know, empirically, that most bank tellers obey such commands, we regard the pistol point command as coercive. In this sense of the word, a behavioral scientist can properly describe the pistol point command as a "coercive" stimulus, because it produces *statistical* restriction in the range of behaviors that *most* people show in its presence. Of course, a few tellers would disobey the pistol point command. Some might scream. Others might push an alarm button, struggle with the robber, or simply freeze. Each of those behaviors would have been determined by the different antecedent events and reinforcement history of each teller's life experiences. The behaviors of tellers who *obey* the pistol point command would also have been determined by the different antecedent events and reinforcement history of their lives. Thus, when behavioral scientists say that a particular stimulus was coercive, they mean only that that stimulus, combined with the antecedent circumstances and reinforcement histories that are, by inference, common in most people's lives, would curtail the range of possible behaviors most people would exhibit.

If we were to ask the bank teller why he/she obeyed the robber's command and handed over the money, we might be told that having considered the likely conse-

quences of obeying or disobeying, the teller had made a "rational decision" and "chose" to avoid the risk of death, by obeying the command.

Presumably, the *law* would conclude that the teller's "choice" was coerced, because the teller's "will" had been overborne by the threat of physical harm.[8] Behavioral science would agree that the teller's choice was coerced. However, behavioral science would not posit that the pistol point command had overborne the teller's "will." Rather, behavioral science would simply say the choice was coerced in the sense that the overwhelming number of people placed in that circumstance would engage in the same behavior the teller did. This simply means that most people would agree with the teller that the likely consequence of obeying the command is more desirable than the likely consequence of disobeying.

There is no general concept in behavioral science that defines coercion in terms of some supposed inner state of the person. Coercion (or constraint) is a feature of the *external* environment, measurable by the presence of actual physical constraints, or inferred by the constricted range of behavior that most people show in that environment.

When measuring coercion in this statistical sense, psychologists and other behavioral scientists can infer the *degree* of coercion of a particular stimulus by measuring how much that stimulus affects the range of behaviors people generally show. When an apparently healthy male beggar asks for money, a few people give a little, a few give more, and most simply walk on. Begging, then, is not ordinarily very coercive. There are circumstances, however, in which begging can be very coercive. For example, if the beggar is an emaciated and inadequately clothed seven year old girl, begging for money for food or lodging on a freezing winter night, most of the same

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[8] On these facts, no state would prosecute the teller as an accomplice.

people who ignored the healthy male beggar's request would probably provide some assistance to the young girl. Should this happen, the givers would be "coerced," not because they fear physical harm to themselves if they ignore the request, but because ignoring the current stimulus event (the request of a helpless young girl), in the context of the antecedent circumstances and reinforcement histories in their lives, would lead to aversive consequences, experienced as subjective feelings of guilt, shame or heartlessness.

The point of this example is simply to show that "coercion," from a behavioral science perspective, does not depend upon or imply force or the threat of physical harm. The threat of physical harm is particularly coercive only because the antecedent circumstances in *most* people's lives cause them to avoid physical harm whenever possible. For example, when a mugger asks for money with a knife at the victim's throat, most people give it.[9] Armed mugging is thus quite coercive. From the scientific point of view, the difference between the average response to a male beggar and the average response to an armed mugger is not attributable to the effects of each circumstance on an entity called "will." It is simply a question of empirical evidence about the range of responses typically shown in the two circumstances.

B. Cognitive Capacity

Psychologists and other behavioral scientists can speak of cognitive capacity (and terms such as "rationality" or "rational intellect") more meaningfully than they can speak of "volitional" capacity (or terms such as "free will" or "choice"). Human behavior is seen to occur at any point in time as a result of a chain of processes that

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[9] It can be expected that a group of 100 "masochists," or of 100 people actively contemplating suicide, would be less likely to heed the mugger's command than would a group of 100 "normal" people. This simply means that the antecedent circumstances in the lives of the masochistic or suicidal people have caused them to view pain or the risk of death differently from most people.

begins with the impact of an external stimulus, followed by the processing of that information by the senses and the central nervous system, the programming of responses, and the execution of those responses. The total system involved is very complex, and it may become physically defective at many points in the chain. A large number of disease and injury conditions may impair the functioning of the system so that stimuli will be processed and actions executed in ways that would not have happened had the system been fully normal and intact. Various kinds of retardation, brain damage, toxic conditions, metabolic disorders, infections of the nervous system, and so on, may impair the system in this way.

Where there is clear evidence that such a physical condition exists, the behavioral scientist is generally on firm ground in concluding that an individual's cognitive capacity is impaired, and therefore that his or her behavior may not be a product of "rationality" or a "rational intellect."

A physical defect in the cognitive system limits the ability of that system to process and respond normally to stimuli in much the same way a physical constraint, such as confinement, limits the ability of the organism to engage in a wide range of behaviors. Just as a physical constraint necessarily restricts the range of behaviors open to all people subject to that constraint, regardless of their antecedent experiences, so too does a physical defect in the cognitive system necessarily restrict the ability of that system to process and respond to stimuli in a statistically "normal" way.

But if scientists consider cognitive capacity or "rational intellect" in the context of a psychosis that does not yet have a known or clear physical cause, they have to rely on statistical measurements, analogous to the measurements they use to determine whether a nonphysical restraint is or is not coercive. Specifically, they must use behavioral tests or measures of memory, judgment, concept formation, and the like. If those tests con-

sistently show that those abilities are impaired in people validly diagnosed as paranoid schizophrenics, or in people who obey command hallucinations, then they can infer, even absent clear physical causes, that normal cognitive processing is likely to be impaired in such people. If those tests do not consistently show such impairment, then they must conclude that there is no necessary correlation between paranoid schizophrenia or command hallucinations and cognitive impairment.

II. FROM A BEHAVIORAL SCIENCE PERSPECTIVE, THE AVAILABLE EVIDENCE WARRANTS AND SUPPORTS THE PSYCHIATRIC OPINION THAT RESPONDENT'S COGNITIVE CAPACITY WAS NOT IMPAIRED.

Respondent had previously been diagnosed as suffering from paranoid schizophrenia, and was so diagnosed by Jeffrey Metzner, M.D., the psychiatrist whose conclusions concerning respondent were adopted by the trial court.[10] Accordingly, the first question *amicus* will examine is whether persons suffering from paranoid schizophrenia are *necessarily* suffering cognitive impairment.[11] This is a complex question. By definition, the paranoid type is a schizophrenic disorder "dominated by one or more of the

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[10] See the Psychiatric Examination Report, dated September 22, 1983, of Jeffrey Metzner, M.D. (hereafter "Report") at 7. This Report was incorporated into the trial court's findings of fact. See the Transcript of the Hearing held on May 25, 1984 (hereafter "Transcript") at 85. Using the Nomenclature of the AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980) (hereafter, "DSM-III"), Dr. Metzner diagnosed respondent under DSM-III category 295.34 as suffering from schizophrenic reaction, paranoid type. The first three digits (*i.e.*, "295") indicate schizophrenic disorder. The fourth digit (*i.e.*, "3") indicates paranoid type. The fifth digit (*i.e.*, "4") indicates that the course of the disorder is chronic, with acute exacerbation. DSM-III at 181-193.

[11] The question is not whether paranoid schizophrenics *may* be suffering cognitive impairment. Of course they may. But persons who are free of any mental disorder may also, for other reasons, suffer cognitive impairment.

following: (1) persecutory delusions, (2) grandiose delusions, (3) delusional jealousy, (4) hallucinations with persecutory or grandiose content." DSM-III at 191.[12]

There is no indication in the materials available to *amicus*, including Dr. Metzner's Report, that respondent suffered from persecutory delusions, from delusional jealousy, or from hallucinations with persecutory content, but there is some indication that respondent suffered from grandiose delusions, or from hallucinations with grandiose content.[13] Assuming that respondent was correctly diagnosed, the question is whether persons suffering from delusions or hallucinations (particularly from grandiose delusions or from hallucinations with grandiose content), will *necessarily* show impairment of their cognitive capacity.

"Cognitive capacity," and "rational intellect" are broad and imprecisely defined concepts. From the behavioral science perspective, cognitive capacity includes the capacity to perceive and record or encode information from an external stimulus, the capacity to store that information (both short term and long term memory), the capacity to retrieve or recall that information, the capacity to program or process that information and relate it to

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[12] Hallucinations are reported sensory perceptions without external stimulation of the relevant sensory organ. Delusions are false personal beliefs based on incorrect inferences about external reality that are maintained despite incontrovertible proof to the contrary. DSM-III at 356, 359. *See* L. ULLMAN & L. KRASNER, A PSYCHOLOGICAL APPROACH TO ABNORMAL BEHAVIOR 359 (1969).

[13] Respondent explained that because God is his Father "it's like I'm Jesus Christ . . . Jesus was a person . . . I was Jesus back then . . . but now I'm Barry Connelly . . . . it's like reincarnation." Report at 5. Respondent also described hearing the voice of God speak personally to him on many occasions, going back several years. Report at 3-6. With one exception (essentially, incoherence or markedly illogical thinking associated with blunted, flat or inappropriate affect, or with catatonic or other grossly disorganized behavior—see DSM-III at 188-189), the presence of delusions or hallucinations is also required for the general diagnosis of schizophrenic disorder. See DSM-III at 188.

other information, and the capacity to use that information in regulating behaviors.[14] Depending on which aspect of cognitive capacity is being examined, a particular delusion or hallucination may have a substantial effect, or no effect.

Of course, almost by definition, the presence of hallucinations (though not necessarily delusions) implies the possibility of some impairment of cognitive capacity, particularly with respect to perception. Most behavioral scientists regard hallucinations of external voices (including the voice of God) as the hallucinator's misattribution to an external source of what are really the inner thoughts and images of the hallucinator.[15] Indeed, the most widely recognized cognitive impairment associated with auditory hallucinations in paranoid schizophrenics is their failure or inability to perceive that the voices (and commands) they attribute to an external source are, in reality, expressions of their own wishes, thoughts and imagery. Heilbrun, *Impaired Recognition of Self-Expressed Thought in Patients With Auditory Hallucinations*, 89 J. ABNORMAL PSYCHOLOGY 728 (1980); Mintz & Alpert, *Imagery Vividness, Reality Testing, and Schizophrenic Hallucinations*, 79 J. ABNORMAL PSYCHOLOGY 310 (1972).

The assumption that hallucinators misperceive internal stimuli as originating in an external source is subject to an important qualification that is arguably relevant to this case. Empirical research suggests that schizophrenic hallucinators tend to be poorer at distinguishing between metaphorical and literal language than non-hallucinators. This is so whether the language originates, in fact, from an external source (for example, a friend or therapist), or from the individual. This fact raises the possibility that some of what scientists view as the misperception or misattribution of the source of a command may simply

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[14] *E.g.*, George & Neufeld, *Cognition and Symptomatology in Schizophrenia*, 11 SCHIZOPHRENIA BULLETIN 264 (1985).

[15] George & Neufeld, *supra* n.14, at 269.

be a function of constricted language skills, *i.e.*, that individuals mean to convey metaphorical statements, but confuse metaphor with literal usage, and end up expressing themselves as if they believed in the literal truth of what they meant to express metaphorically. Miller, Johnson & Richmond, *Auditory Hallucinations and Descriptive Language Skills*, 3 J. PSYCHIATRIC RESEARCH 43 (1965). Thus, when an individual says "God told me to confess," that statement could reflect the individual's misperception and misattribution of an internal stimulus, or it could simply reflect the individual's inability to speak in metaphorical or non-literal language. If the latter, the individual's perceptions may actually be intact. The individual may understand the internal source of the thought he or she is expressing, but may be unable to express that understanding precisely. Thus, the statement "God told me to confess" may only reflect the individual's inability to say "My understanding of what God would want me to do is to confess," or "Given my religious beliefs, I should confess," or "My conscience and feelings of guilt are bothering me so much that I have to confess."

It is impossible to determine from the information available to *amicus* whether respondent's statements concerning God's commands to confess indicated impaired ability to distinguish between internal and external stimuli, or only impaired ability to express himself precisely. This distinction was apparently not explored by Dr. Metzner.

But even if this aspect of cognitive capacity—the ability to distinguish between internal and external stimuli—is always or almost always impaired in individuals experiencing auditory hallucinations, it does not follow that other aspects of cognitive capacity are similarly impaired. We must still examine whether the capacity of the hallucinator to store, retrieve, process and use the misperceived information is necessarily impaired, and whether the capacity of the hallucinator to perceive, store, retrieve, process and use *other* information actually received from external sources (for example, from police

officers), is necessarily impaired. And we must examine whether the cognitive capacity of persons experiencing delusions, but not hallucinations, is necessarily impaired.[16]

The professional literature on the issue of general cognitive impairment in schizophrenia is massive. Many findings are contradictory or unreliable, often because of methodological flaws. Recognizing that the subject is too vast and too complex to be treated comprehensively here, and limiting our analysis to those studies that are methodologically sound and directly related to the particular issues of cognitive capacity presented by the facts of this case, *amicus* believes the following is a fair general summary of the relevant literature:

(a) *There is no necessary correlation between delusions and cognitive impairment.* Delusions of various kinds occur in association with a very large number of medical and psychiatric disorders. Maher & Ross, *Delusions*, in COMPREHENSIVE HANDBOOK OF PSYCHOPATHOLOGY 383 (Adams & Sutker eds. 1984). More than 70 different disorders, including renal malfunction, malaria, typhus and substance abuse, may be accompanied by delusions. *Id.* As Maher & Ross make clear, delusions occur quite often in disorders in which there is no independent reason to conclude that the patient is suffering from any cognitive impairment. *Id.* at 383-409. Thus, the presence of a delusion does not necessarily imply cognitive impairment. Indeed, "the mere fact that delusions are discerned in a clinical picture tells the diagnostician almost nothing about the probable pathology present in the case." *Id.* at 398.

(b) *There is no necessary correlation between the presence of delusions and incapacity to reason logically.* "Experimental studies have demonstrated that no difference

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[16] It is difficult to maintain the distinction between hallucinations and delusions in the circumstances of this case. Although respondent arguably was suffering from a grandiose delusion (that he was Jesus Christ—*see* Metzner Report at 5), that delusion was intimately associated with his repeated auditory hallucinations that God was speaking personally to him.

in ability to reason logically exists between delusional patients and others." Maher & Ross, *supra* at 401. *See also* Nims, *Logical Reasoning in Schizophrenia: The Von Domarus Principle*, 20 DISSERTATION ABSTRACT 383 (July 1959) (unpublished doctoral dissertation, U. So. Cal.); Williams, *Deductive Reasoning in Schizophrenia*, 69 J. ABNORMAL & SOCIAL PSYCHOLOGY 47 (1964).

(c) *There is no necessary correlation between hallucinations and gross impairment of reality testing.* The existence of an hallucination does not necessarily imply that the hallucinator is psychotic or is suffering from gross impairment of reality testing. Indeed, the DSM-III definition of hallucination expressly provides that "hallucinations indicate a psychotic disturbance *only* when they are associated with gross impairment in reality testing. . . ." DSM-III at 360 (emphasis added). Actually, a severely disorganized person would think the voices were real, and would not be aware that they were hallucinations. Thus, "the fact that the schizophrenic can answer the question [whether he is experiencing hallucinations] appropriately and accurately despite its semantic implications is an indication of his relatively intact cognitive functioning."[17] Respondent apparently acknowledged during his interview with Dr. Metzner that he had experienced both auditory and visual hallucinations. Metzner Report at 3. Furthermore, although Dr. Metzner's Report is not entirely clear on this point, respondent apparently understood that the voices were sufficiently unlike real-world phenomena that the police would not believe him, but doctors would.[18]

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[17] Robins, *Pitfalls in Questioning Patients About Auditory Hallucinations*, S.A. MEDICAL JOURNAL 2349, 2350 (1973). As Robins notes: "To the truly hallucinated patient, the 'voices' are ingredients of his perceptual reality, and he should no more specifically admit them than the normal person would the voices he hears over the radio." *Id.* at 2349-2350.

[18] Metzner Report at 6: "Mr. Connelly explained that he did not relate many details of the alleged crime to the police because he felt they would not believe him. [But] 'a doctor . . . a doctor would understand the voices. . . .'"

(d) *There is no necessary correlation between hallucinations and sub-average intelligence.* There is some evidence that there are slight differences from the norm tending towards lower scores on intelligence tests in hallucinating patients, but the actual IQ levels exhibited by hallucinating schizophrenic patients are well within the normal range. Johnson & Miller, *Auditory Hallucinations and Intellectual Deficit*, 3 J. PSYCHIATRIC RESEARCH 37 (1965).[19]

(e) *There is no necessary correlation between paranoid schizophrenia and inability to judge external stimuli accurately.* The most precise method for studying whether individuals can identify external stimuli correctly is a technique in which the subject is required to identify whether a rapidly presented stimulus is or is not of a specified category. Such studies show that although the overall judgment accuracy of nonparanoid schizophrenics is significantly lower than that of nonschizophrenics, the overall judgment accuracy of paranoid schizophrenics is *not* significantly lower than that of nonschizophrenics. *E.g.*, Gillis & Blevens, *Sources of Judgmental Impairment in Paranoid and Nonparanoid Schizophrenics*, 87 J. ABNORMAL PSYCHOLOGY 587-596 (1978).[20] Thus, at least with respect to external stimuli that are not closely associated with the individual's delusions, paranoid schizophrenics seem able to judge exter-

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[19] Johnson and Miller found, however, that schizophrenic patients who reported auditory hallucinations had scored significantly lower on IQ tests administered *prior* to the onset of schizophrenia than had schizophrenic patients who did *not* report auditory hallucinations. They interpreted that evidence "as indicating that there may be a cognitive predisposition for the eventual reporting of auditory hallucinations in schizophrenia." *Id.* at 41.

[20] These studies typically involve neutral and nonthreatening external stimuli (for example, bar graphs on a TV screen). It is conceivable, although *amicus* is not aware of studies to that effect, that the overall judgment accuracy of paranoid schizophrenics might be significantly lower than that of nonschizophrenics if the external stimuli were of a type the paranoid schizophrenics might incorporate into their delusions.

nal stimuli about as accurately as nonschizophrenics. There is no evidence (or suggestion) that respondent incorporated the police officers, or anything they said to him, into his delusional system. He apparently knew they were police officers, agents of the state, who would arrest and confine him if he confessed. See Metzner Report at 4-5. Accordingly, there is no basis for concluding, based solely on his diagnosis, that respondent was substantially impaired in his capacity to evaluate whatever the police officers said or did.[21]

Thus, the relevant literature does *not* warrant the inference that individuals diagnosed as paranoid schizophrenics, or who are experiencing delusions or hallucinations, are necessarily unable to understand what they are doing or the consequences of their acts. In general, there is no necessary correlation between those conditions and substantial impairment of cognitive capacity.[22]

Furthermore, *amicus* is aware of no studies or reports concluding that persons who obeyed *command* hallucinations were cognitively impaired. To the contrary, the available evidence suggests that individuals who *obeyed* command hallucinations were not at that time cognitively impaired.

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[21] The conclusion expressed in this point with respect to respondent would have to be modified if, for example, respondent had believed the police officers were priests, or angels, sent by God to hear his spiritual confession.

[22] This conclusion is consistent with the conclusions reached in closely related contexts. For example, a very recent study found that psychiatric patients as a class do not differ significantly from medical patients in their capacity to consent to research. Stanley, *et al.*, *Informed Consent and Competency in Psychiatric Research*, —— ARCH. GEN. PSYCHIATRY —— (in press; available from the Dept. of Psychiatry, Wayne State University). There were no significant differences between the two groups in their overall comprehension of information or the quality of their reasoning. *Id.* *See generally*, Morse, *A Preference For Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982).

The evidence, however, is surprisingly sparse. It can be said, based on the common and long-standing experience of clinicians, that command hallucinations are a relatively common phenomenon. But *amicus* has found no studies actually documenting the prevalence or incidence of command hallucinations in various populations. Mental health professionals recognize that "command hallucinations may be obeyed, at times creating danger for the individual or others." DSM-III at 183. But DSM-III does not have a separate diagnostic category or subcategory for command hallucinations, and clinicians are not requested or required to document the presence of "command" hallucinations (as opposed to other types of hallucinations) as part of the diagnostic process.

Thus, command hallucinations are *not* included in the prime diagnostic symptoms of schizophrenia, or of paranoid schizophrenia, presumably because command hallucinations can occur in connection with so many different mental disorders (and other conditions) that their presence is not critically essential to the diagnosis of any one of them.[23] In fact, the term "command hallucination" does not actually appear as a recognized technical term in professional dictionaries or encyclopedias.[24] The term is used, however, in published articles in the professional literature, and in this sense is a *de facto* technical term. It refers to auditory hallucinations in which the recipients hear a voice or voices commanding them to perform some action.

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[23] *E.g.*, SCHNEIDER, CLINICAL PSYCHOPATHOLOGY (Hamilton trans. 1959), and DSM-III at 188, discussing other types of auditory hallucinations that are significant in the diagnosis of schizophrenia (including hearing a voice or voices speaking the patient's thoughts aloud, hearing a voice or voices describing the patient's behavior or thoughts, and hearing voices discussing or arguing about the patient).

[24] The term does not occur, for example, in H. KAPLAN, A. FREEDMAN & B. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (3rd ed. 1980); S. ARIETI, AMERICAN HANDBOOK OF PSYCHIATRY (2nd ed. 1974); or in the INTERNATIONAL ENCYCLOPEDIA OF PSYCHIATRY, PSYCHOLOGY, PSYCHO-ANALYSIS AND NEUROLOGY (1977).

Theoretically, there could be studies or reports (a) of persons who obeyed or disobeyed command hallucinations to injure other persons,[25] (b) of persons who obeyed or disobeyed command hallucinations to kill themselves,[26] (c) of persons who obeyed or disobeyed command hallucinations to injure themselves in some non-physical way (for example, as in respondent's case, by confessing to a crime), (d) of persons who disobeyed command hallucinations to mutilate themselves, or (e) of persons who obeyed command hallucinations to mutilate themselves.

In fact, however, in the English speaking literature since 1966, there are almost no studies or reports of categories (a) through (d), and only a few studies or reports of category (e). Accordingly, *amicus'* conclusions with respect to category (e) cases must be viewed as tentative and subject to revision, and extrapolations from category (e) to categories (a) through (d) should be viewed as even more tentative.

Perhaps because command hallucinations are apparently so common, and are so commonly disobeyed, the published literature focuses primarily on cases in which

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[25] Although the percentage of insanity defenses involving command hallucinations is not known, command hallucinations are not uncommon in that context. Indeed, should respondent ever stand trial, it is likely that he would raise such a defense. See Metzner Report at 1, quoting respondent's account of the homicide: " 'the voice told me to kill her and I did . . . I was standing in the alley . . . I waited . . . the voice said to kill her . . . the voice said you're hesitating again . . . that's your problem . . . kill her . . . something came over me . . . I did it . . . I ran away . . .' "

[26] Because the only method for determining the existence of a command hallucination is the hallucinator's report of that experience, it is not surprising that there are few studies or reports of individuals who obeyed command hallucinations to kill themselves. Only if the attempt was unsuccessful, or the individual had reported the command prior to obeying it, could there be such reports. For one such report, involving ten persons who had attempted suicide in response to hearing commands to do so, see van Praag, *CSF 5-HIAA And Suicide in Non-Depressed Schizophrenics*, 2 THE LANCET 977 (Oct. 1983).

the hallucinator obeys the command in a manner that is *prima facie* bizarre, or so unusual as to attract attention. These cases include predominantly acts of self-mutilation, usually castration, mutilation of the genitals, or enucleation of the eyes. One case involved hand amputation, and another mild laceration of the abdomen with a knife.[27]

The published reports describe a total of only 15 definite cases of individuals who mutiliated themselves, apparently in obedience to command hallucinations to do so. In *all* of these cases, the behavior was associated with expressed guilt, generally over sexual matters, and was accompanied by religious preoccupations. It appears that the self-injurious behavior was a form of self-punishment for "crimes" that are not usually punished by society.

Like these cases, respondent's confession was associated with expressed guilt, but the evidence available to *amicus* does not indicate whether there was a sexual component to that guilt. It is not known, for example, whether respondent raped or sexually molested the victim before he allegedly, by his account, killed her. Like these cases,

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[27] *E.g.*, R. SPITZER, A. SKODOL, M. GIBBON & J. WILLIAMS, DSM-III CASE BOOK (1st ed. 1981), 285 (case no. 185); Greilsheimer & Groves, *Male Genital Self-Mutilation*, 36 ARCH. GEN. PSYCHIATRY 441 (1979); Kushner, *Two Cases of Auto-Castration Due to Religious Delusions*, 40 BRITISH J. MED. PSYCHOLOGY 293, 297 (1967) ("In both cases the decision was taken well in advance, adequate preparations were made, and the deed was done in a state of clear consciousness. Neither of them feel any regret; and although patient 1 had sufficient insight to recognize that in 'the eyes of the world he would be mad,' he was not deterred."); Rosen & Hoffman, *Focal Suicide: Self-Enucleation by Two Young Psychotic Individuals*, 128 AM. J. PSYCHIATRY 123 (1972); MacClean & Robertson, *Self-Enucleation and Psychosis*, 33 ARCH. GEN. PSYCHIATRY 242 (1976); Shore, Anderson & Cutler, *Prediction of Self-Mutilation in Hospitalized Schizophrenics*, 135 AM. J. PSYCHIATRY 1406 (1978); Hall, Lawson & Wilson, *Command Hallucinations and Self-Amputation of the Penis and Hand During a First Psychotic Break*, 42 J. CLINICAL PSYCHIATRY 322 (1981).

respondent's confession was accompanied by religious preoccupations. Metzner Report at 5-6.[28] Unlike the typical self-mutilation case, however, respondent's "crime" was a real crime, punishable by society. Thus, unlike the self-mutilators, respondent did not have to mutilate himself to receive punishment for his crime. He simply had to confess, knowing that society would then punish him.[29]

In several of the 15 cases of self-mutilation, the investigators report that the act in obedience to the command appears to have been well planned, in advance of the act, and was committed without evidence of impaired cognition and with evidence of good reality contact.[30] Like these cases, respondent's confessions appear to have been well planned, and in advance. He traveled from Boston to Denver, located the scene of the crime, mailed all of his money to his mother (realizing that once he confessed he would "get locked up" and would not need

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[28] Surprisingly, the Report does not describe respondent's religious background or the relationship of that background, if any, to his delusions or behaviors.

[29] Only one of the reported cases involved the alternatives of confession or self-injury. An individual diagnosed as paranoid schizophrenic felt guilty about a "terrible sexual transgression" (he had attempted sexual intercourse with the family cat). He began to hear voices he did not recognize telling him to amputate his hand and his penis. He also considered other alternatives, including "turning himself in to the police." Eventually, he obeyed the voices. Three weeks later, a mental status examination showed "no gross disturbance of thought presentation or thought flow. . . ." Hall, Lawson & Wilson, *Command Hallucinations and Self-Amputation of the Penis and Hand During a First Psychotic Break*, 42 J. CLINICAL PSYCHIATRY 322 (1981).

[30] The remaining cases do not contain explicit statements that the individuals were cognitively intact, but they do not contain statements to the contrary, either. Although more precise descriptions would have been desirable, the impression gathered from these remaining reports is that the investigators would have reported evidence of substantial cognitive impairment had there been such evidence.

money, identified a uniformed police officer, and confessed.[31]

In view of these cases, the fact that respondent confessed in response to a command hallucination would not mean that respondent's cognitive capacity was necessarily impaired. Based on all of respondent's reported statements and actions at the time of his confessions, Dr. Metzner concluded that respondent's cognitive capacities were not, at that time, significantly impaired.[32] Although respondent's case is in several respects different from those reported here, the statistical pattern of relatively intact cognitive functioning reflected in those cases justifies and supports the clinical conclusion reached by Dr. Metzner.

III. FROM A BEHAVIORAL SCIENCE PERSPECTIVE, THE AVAILABLE EVIDENCE DOES NOT WARRANT THE PSYCHIATRIC OPINION THAT RESPONDENT'S VOLITIONAL CAPACITY WAS IMPAIRED.

Dr. Metzner testified that respondent's command hallucinations impaired his volitional capacity.[33] As noted *supra*, Point I, behavioral science does not use or rely upon the concepts of "volition" or "free will." Accordingly, Dr. Metzner was not testifying as a scientist when he testified that respondent's command hallucinations impaired his "volitional capacity." Furthermore, even if

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[31] Metzner Report at 4-5.

[32] Dr. Metzner testified as follows: "From what Mr. Connelly described to me, that was pretty consistent in my mind with a command hallucination, and that really affects his volitional abilities, that is, his ability to make free and rational choices. I think that his illness did not significantly impair his cognitive abilities. . . ." Transcript at 56. Later, when asked whether "the command hallucinations that you talked about affect volitional ability, but not cognitive," Dr. Metzner replied: "In Mr. Connelly's case, it was my opinion that it affected his volitional ability." Transcript at 67.

[33] Transcript at 56, 67. See note 32, *supra*.

Dr. Metzner only meant to testify that command hallucinations are, in a statistical sense, coercive, his testimony finds no support in the professional literature, and is contrary to clinical experience.

Although precise figures are not available, clinical experience suggests that the vast majority of people receiving command hallucinations do not obey them.[34] Probably less than one percent (1%) of all people who receive command hallucinations actually obey them, and the percentage is likely to be even lower for persons who receive command hallucinations to act in ways that are physically harmful to them, or otherwise contrary to their self-interests.

Thus, statistically, command hallucinations are not coercive. Accordingly, the only testimony a behavioral scientist could appropriately provide would be testimony, based on clinical experience, that it is statistically *unlikely* that respondent confessed because he had received command hallucinations to do so. Accordingly, Dr. Metzner's testimony on this point was directly contrary to the only evidence on which he could validly base a professional opinion.

IV. IN THE CIRCUMSTANCES OF THIS CASE, SUPPRESSION OF RESPONDENT'S PRECUSTODIAL AND POST-*MIRANDA* CONFESSIONS IS NOT NECESSARY TO FURTHER THE VALUES PROTECTED BY THE DUE PROCESS CLAUSE.

As a preliminary matter, *amicus* notes that the Fifth Amendment's privilege against self-incrimination does not apply in the circumstances of this case. That privilege applies only when the confession results from "official coercion." *See Oregon v. Elstad*, 105 S.Ct. 1285

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[34] Indeed, at least initially, respondent disobeyed God's commands. " 'God said he wanted me to walk up to them [the police] . . . tell them you killed somebody . . . that I wanted to turn myself in . . . *I wouldn't do it* . . . I was afraid . . . He [God] said buy a razor blade and kill myself . . . *I wouldn't do it* . . . I didn't want to kill myself . . . .' " Metzner Report at 4 (emphasis added).

(1985); *New York v. Quarles*, 104 S.Ct. 2626 (1984); *United States v. Washington*, 431 U.S. 181 (1977).[35] The trial court found that there was no official coercion or improper conduct of any kind, and respondent does not dispute that finding. Transcript at 85.

In evaluating the admissibility of confessions under the due process clause, the Court has "framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary' . . . ." *Miller v. Fenton*, 106 S.Ct. 445, 449 (1985), quoting *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).[36] But although the inquiry has been variously framed,[37] it is clear that the purpose of the inquiry is to ensure that the confession is trustworthy, and is not the product of "inquisitorial," [38] or

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[35] The Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion. . . . 'Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions'." *Elstad*, 105 S.Ct. at 1291, quoting *United States v. Washington*, 431 U.S. at 187 (other citations omitted). *But see In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that the admission [is] voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent *fantasy*, fright or despair.") (emphasis added, footnote omitted).

[36] *Miranda* used a similar due process analysis to determine the validity of *Miranda* waivers. 384 U.S. at 475 ("provided the waiver is made voluntarily, knowingly and intelligently."). *See* also, *Moran v. Burbine*, —— U.S. —— (No. 84-1485, Slip op., March 10, 1986), at 7; and *Fare v. Michael C.*, 442 U.S. 707 (1979). *See generally* T. GRISSO, EVALUATING COMPETENCIES 113-155 (1986).

[37] *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (whether the suspect's "will was simply overborne"); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (whether the suspect had the "capacity for self-determination" or the ability to make "an essentially free and unconstrained choice"); *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960) (whether the suspect's statements were "the product of a rational intellect and a free will").

[38] *Miller v. Fenton*, 106 S.Ct. at 449, *citing Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

otheriwse improper, official conduct. *See Jackson v. Denno*, 378 U.S. 368, 384-86 (1964); *Blackburn v. Alabama*, 361 U.S. at 206-07. The due process clause requires that confessions be trustworthy and reliable because it would offend our sense of fundamental fairness to convict people of crimes they did not actually commit, even if their confessions were not the result of improper official conduct. Similarly, confessions that are extracted by means of improper official conduct will be suppressed even when "independent corroborating evidence [leaves] little doubt of the truth of what the defendant [has] confessed." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). Although these are distinct and important values, neither is implicated by the facts of this case.

The reliability of a confession in response to a command hallucination would certainly be an issue in many cases, because at least some people who receive command hallucinations to confess might acknowledge guilt falsely.[39] But respondent's counsel appears to have conceded "the truthfulness and veracity of [the] statements made [by respondent] to the police." Transcript at 78-A.[40] Respondent and his counsel have apparently never contended that respondent was innocent of the crime to which he confessed, and although *amicus* can find no specific confirmation in the record, the parties all seem to agree

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[39] The reliability concern is whether people who make self-incriminating statements in response to command hallucinations are likely to acknowledge guilt falsely: "'[U]nder certain stresses a person, especially one of defective mentality or peculiar temperament, . . . [may find] that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.'" *In re Gault*, 387 U.S. at 44-45, *quoting* 3 Wigmore, Evidence § 822 (3d ed. 1940).

[40] Respondent's Brief In Opposition To Petition For Writ of Certiorari, at 2, states that "Mr. Connelly identified the girl he had killed as Mary Anne Junta and later took detectives to the location where he had killed her and left the body."

that the place where respondent led the police was, in fact, the place where the body of a young girl had been found, and appear to agree that the girl had been stabbed to death, as respondent claimed.

Similarly, as noted, respondent does not even claim that his confession was the result of improper official conduct.

Accordingly, at least in the circumstances of this case, suppression of respondent's precustodial and post-*Miranda* statements is not necessary in order to further either of the values protected by the due process clause in this context.

V. CLARIFICATION OF THE TESTS USED TO DETERMINE THE ADMISSIBILITY OF CONFESSIONS WOULD FACILITATE MEANINGFUL TESTIMONY BY PSYCHOLOGISTS AND OTHER BEHAVIORAL SCIENTISTS.

Although variously worded, the tests used by this Court to determine the admissibility of confessions all have a cognitive component and a volitional component. *See, e.g., Moran v. Burbine*, —— U.S. —— (No. 84-1485, Slip op., March 10, 1986), p. 7; and *Blackburn v. Alabama*, 361 U.S. at 208 ("rational intellect and free will"). *See also New York v. Quarles*, 104 S.Ct. 2626 (1984). From a behavioral science perspective, it would facilitate meaningful testimony if the cognitive component could be stated as whether the individual understood his rights and understood the consequences of waiving them, and if the volitional component could be stated as whether the pressures to which the individual was subjected would cause most individuals in the defendant's circumstances to confess.

It would also be helpful to clarify whether the legally relevant pressures are limited to official pressures, or would also include, for example, a threat from a friend to turn the individual in if the individual does not con-

fess, a statement from the individual's priest or religious advisor that if the individual does not confess he or she will go to hell, or a threat from a relative to disinherit the individual, or inflict severe physical punishment on the individual, if the individual does not confess.

Finally, because it is difficult for psychologists and other behavioral scientists to discuss "volitional" behavior in other than statistical terms, lower courts should be precluded from requiring such experts to express opinions on the ultimate question of whether the volitional capacity of a particular individual was or was not impaired.[41]

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the judgment of the Supreme Court of Colorado.

Respectfully submitted,

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[41] *E.g.*, Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 L. & HUMAN BEHAV. —— (in press, June 1986); American Psychological Association, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099 (1978); McQueen, *The Psychologist To The Witness Stand*, 32 CLINICAL PSYCHOLOGIST 4 (1979); and AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE (1982).

Supreme Court, U.S.
FILED
MAR 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-660

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF COLORADO,
Petitioner,
v.
FRANCIS BARRY CONNELLY,
Respondent.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER BY THE COLORADO ATTORNEY GENERAL AND THE 35 AMICI THAT APPEAR ON THE INSIDE COVER

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QUESTIONS PRESENTED FOR REVIEW

1. Does the due process clause of the fourteenth amendment require suppression of a confession as "involuntary" absent any action by the police to elicit the confession?

2. Where a suspect is advised of his *Miranda* rights and admittedly understands them, is his waiver of rights involuntary solely because he psychotically believed that he had no choice but to confess?

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STATEMENT OF THE AMICI CURIAE

The *amici curiae* are officers or organizations of officers who have law enforcement responsibilities in their jurisdictions. Having obtained the written consent of the parties to the case, they file this brief in support of the petitioner pursuant to Sup. Ct. R. 36.2.

STATEMENT OF THE CASE

On August 18, 1983, Francis Connelly walked up to a uniformed, off-duty police officer in downtown Denver and said: "I . . . murdered someone and I want[ ] to turn myself in" (J.A. 2-4). The officer initially suspected Connelly was a "crackpot" (J.A. 4), but Connelly's dress and demeanor suggested to the officer that he was neither mentally unstable nor under the influence of drugs or alcohol (J.A. 5). The officer then gave Connelly *Miranda*[1] warnings and asked if he understood them (J.A. 6). Connelly said he did (J.A. 6) and told the officer that in late 1982 he had killed a young girl near West Mississippi Avenue in southwest Denver (J.A. 37).

The officer handcuffed the respondent, searched him cursorily (J.A. 6), and took him into a nearby newsstand where he checked Connelly's driver's license for identification (R., v. 2, p. 11). The officer then called the Denver Police Department for information to corroborate the respondent's story (R., v. 2, p. 12). A detective told the officer to keep Connelly there until the detective arrived (R., v. 2, p. 12).

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The officer then again told Connelly that he did not have to talk (J.A. 7). Connelly responded "that it was all right, that he would talk to [the officer] because his conscience had been bothering him . . ." (R., v. 2, p. 16). The officer asked him if he had been drinking or using drugs (J.A. 7). Connelly said no (J.A. 7). The officer then asked if he had ever been treated for any mental disorders (J.A. 7). Connelly said he had been in several mental hospitals (J.A. 7).

The detective arrived about 15 minutes after the officer called (R., v. 2, p. 15). He ordered the handcuffs taken off, placed Connelly in the police car, repeated the *Miranda* warnings, and asked him what was on his mind (J.A. 11-12). Connelly told the detective that he had returned to Colorado from Boston because he wanted to confess to the murder of a young Indian girl, Mary Anne Junta (J.A. 12; R., v. 2, p. 25). The detective drove Connelly to police headquarters where records revealed that in April 1983 an unidentified female body had been discovered in the area Connelly described (J.A. 13-14).

Upon the detective's request, Connelly repeated to a police sergeant the story he had told the detective (J.A. 15). Connelly said the murder occurred in southwest Denver, somewhere near Mississippi Avenue, he thought, but he was not positive (R., v. 5, p. 27). He "openly came out and told [the sergeant and detective] that he would be glad to show [them] where it happened" (R., v. 2, p. 27).

The three men then drove toward southwest Denver (R., v. 2, p. 27). Connelly directed them to an alley behind some industrial buildings (R., v. 2, p. 29). "This is it," Connelly said as they walked up to a storage area

behind the buildings (R., v. 2, p. 30). This was where he stabbed the girl, covered her with a mattress, and left her, he said (R., v. 2, p. 31). He said he was frightened to be there; he appeared "nervous and cautious" (R., v. 2, pp. 30-31).

The district attorney charged Connelly with second degree murder, Colo. Rev. Stat. 18-3-103(1)(a) (1978) (R., v. 1, pp. 1-3). The district court ordered Connelly to undergo psychiatric examination to determine his competence to proceed (R., v. 1, pp. 4-6). The prosecutor and Connelly's attorney agreed that Connelly should also be examined to determine whether he "was competent at the time he was arrested and talked with Denver police officers" (R., v. 1, pp. 4-6).

In the psychiatrist's opinion, the confession was motivated by "command auditory hallucinations"[2] (R., v. 1, pp. 10-17; J.A. 24-26). The psychiatrist reported:

> The confession appears to have been the result of command auditory hallucinations which significantly impaired Mr. Connelly's mental ability to make free and intelligent decisions at the time immediately surrounding his arrest. Therefore, there appears to be significant doubt regarding Mr. Connelly's ability to have made a truly voluntary statement or confession to the police on August 18, 1983.

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[2]The psychiatrist testified: "[A] command [auditory] hallucination is . . . a type of hallucination in which the person experiencing it feels as if they have to act on whatever the voice is telling them" (J.A. 25). Connelly described the voice he heard as "God's voice" (J.A. 19).

(R., v. 1, p. 17). He testified, however, that Connelly's "illness did not significantly impair his cognitive abilities" (J.A. 25, 34-35).[3]

The district court suppressed all of Connelly's statements to the police (J.A. 49). Even though the Court specifically found "that there was nothing untoward in what the police did in receiving and recording [Connelly's] comments to them" (J.A. 43), the court concluded that all of Connelly's statements were involuntary because Connelly "did not exercise free will in choosing to talk to the police. . . . He was compelled by his illness to [confess]" (J.A. 47). The court further noted that the prosecution could not establish by clear and convincing evidence that Connelly knowingly, voluntarily, and intelligently waived his *Miranda* rights (J.A. 48).

On interlocutory appeal,[4] the Colorado Supreme Court affirmed the suppression of Connelly's statements, but relied on different grounds. *People v. Connelly*, 702 P.2d 722 (Colo. 1985). Whereas the district court suppressed all of Connelly's statements to the police on the ground that their admission into evidence would violate due process, the Colorado Supreme Court suppressed only Con-

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[3]In the course of his examination of Connelly, the psychiatrist elicited details of the crime as well as circumstances surrounding the confessions (R., v. 1, pp. 11-17). Connelly told the psychiatrist that he stabbed the girl with a fishing knife: "It was confusing [. . .] I don't know how it actually happened . . . I had the knife . . . the voice told me to kill her and I did . . . I don't know how many times I stabbed her . . ." (R., v. 1, p. 11).

[4]Colo. Rev. Stat. § 16-12-102 (1978) affords the prosecution the right to an interlocutory appeal of "any decision of the trial court in a criminal case upon any question of law." *See* Colo. R. App. P. 4.1.

nelly's initial statement as "involuntary"; it suppressed the remainder of Connelly's statements on the ground that the prosecution failed to show by clear and convincing evidence that Connelly had effectively waived his *Miranda* rights. *People v. Connelly*, 702 P.2d at 728-29.

SUMMARY OF ARGUMENT

Where the police take no action to elicit a suspect's confession, the due process clause of the fourteenth amendment has no application. The Colorado Supreme Court suppressed the respondent's confession as "involuntary" despite the fact that the police took no action to induce it. The Colorado Supreme Court erred.

The voluntariness of a waiver turns on precisely the same question at issue in the determination of the "voluntariness" of a confession: whether the police improperly exerted pressure on someone to talk. Where the police advise a suspect of his *Miranda* rights and he admittedly understands them, his waiver of rights is voluntary when the police exert no pressure to induce him to talk.

ARGUMENT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE SUPPRESSION OF A CONFESSION AS "INVOLUNTARY" ABSENT ANY ACTION BY THE POLICE TO ELICIT THE CONFESSION.

The fourteenth amendment provides: "No state shall . . . deprive any person of life, liberty or property with-

out due process of law. . . ." U.S. Const. amend XIV, § 1. This clause was " 'intended to secure the individual from the arbitrary exercise of powers of government,' " *Hurtado v. California,* 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely,* 4 Wheat. 235, 244 (1819)). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty or property." *Daniels v. Williams,* 106 S. Ct. 662, 665 (1986) (emphasis in original).

The Court first applied the due process clause to confessions in state cases in *Brown v. Mississippi,* 297 U.S. 278 (1936). Because the petitioners' confessions were extracted through brutal torture,[5] the court had little difficulty[6] concluding that the admission of the confessions into evidence violated due process. *Brown,* 297 U.S. at 286. As courts considered coerced confession cases with increasing frequency, they used "different terms to express the test by which to judge the inadmissibility of a confession, such as 'forced', 'coerced', 'involuntary', 'extorted', 'loss of freedom of will.' " *Ashcraft v. Tennessee,* 322 U.S. 143, 159 (1944) (Jackson, J., dissenting). By 1960, the court described the due process inquiry that

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[5]One petitioner was repeatedly hung from a tree, tied, and whipped. *Brown v. Mississippi,* 297 U.S. 278, 281 (1936). Other petitioners were whipped with a leather strap with buckles on it. *Id.* at 282.

[6]The Court remarked: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners . . . ." *Brown v. Mississippi,* 297 U.S. at 286.

originated in *Brown* by the "convenient shorthand" of asking whether a confession was "involuntary." *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *accord Miller v. Fenton*, 106 S. Ct. 445, 449 (1985); *Schneckloth v. Bustamonte*, 412 U.S. 218, 280-81 & n.7 (1973) (Marshall, J., dissenting) (the labels "voluntary" and "involuntary" "are shorthand labels for an assessment of the police behavior in light of the particular characteristics of the individual"). The due process foundation of the inquiry, of course, never varied: the test always required some action by the government. *Compare Brown v. Mississippi*, 297 U.S. at 286 ("The due process clause requires 'that *state action* . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'.") (emphasis added; citation omitted) *with Miller v. Fenton*, 106 S. Ct. at 449 ("[*T*]*actics for eliciting* inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.") (emphasis added).

The Court has recognized that the due process inquiry into "voluntariness" reflects a "complex of values." *Blackburn v. Alabama*, 361 U.S. at 207. At the core of the "complex" lies the notion of fundamental fairness. *E.g.*, *Brown v. Mississippi*, 297 U.S. at 285-86; *see* 3 J. Wigmore, *Evidence* § 826(c) (J. Chadbourn rev. 1970). Because our legal system is accusatorial, not inquisitorial, confessions extracted through official coercion may not stand. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). Such confessions offend due process regardless of their reliability. *Id.*; *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see Jackson v. Denno*, 378 U.S. 368 (1964).

Whether a confession is "voluntary" or "involuntary" turns on the totality of circumstances. *Mincey v. Arizona,* 437 U.S. 385, 401 n.17 (1978); *Culombe v. Connecticut,* 367 U.S. 568, 606 (1961). There is no "single litmus-paper test." *Culombe,* 367 U.S. at 601. The Court has considered several factors relevant to the test: some reflect personal traits of the accused, but many more reflect the characteristics of the detention and interrogation. *See* 3 J. Wigmore, *Evidence* § 826(c) at 252 n.11 (J. Chadbourn rev. 1970) (listing more than 29 factors). The Court has deemed some characteristics of the detention and interrogation so offensive that they need not be balanced against any personal traits of the accused; rather, those characteristics *per se* offend due process. *See, e.g., Ashcraft v. Tennessee,* 322 U.S. at 154 (36 hour interrogation is "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear").

On the other hand, the Court has never concluded that any personal trait of an accused is sufficient to render his confession "involuntary." Personal traits are not in themselves coercive: "Rather they [are] relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect." *Procunier v. Atchley,* 440 U.S. 446, 454 (1971).

In the 50 years since the Court first held that the due process clause prohibits coerced confessions, the Court has found due process violated only where there has been some coercive official conduct.[7] There was none here. Un-

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[7]*Beecher v. Alabama,* 408 U.S. 234 (1972) (confession was part of stream of events flowing from grossly coercive nature of

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disputed evidence establishes that the respondent first spoke without any inducement whatsoever on the part of

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petitioner's arrest); *Darwin v. Connecticut*, 391 U.S. 346 (1968) (30 to 48 hour incommunicado detention; refusal to allow petitioner's attorneys to speak with petitioner); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (deprivation of medication, sleep, and food); *Brooks v. Florida*, 389 U.S. 413 (1967) (14 day incommunicado detention in a "windowless sweatbox"; meager food and water); *Beecher v. Alabama*, 389 U.S. 35 (1967) (threats of violence; interrogation while petitioner was in intense pain after effect of morphine dissipated); *Clewis v. Texas*, 386 U.S. 707 (1967) (incommunicado detention and interrogation; deprivation of sleep and food); *Davis v. North Carolina*, 384 U.S. 737 (1966) (16 day incommunicado detention; daily interrogation; limited provender); *Haynes v. Washington*, 373 U.S. 503 (1963) (16 hour incommunicado detention; repeated refusal to allow petitioner to call his wife); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (threats to take away petitioner's children and to cut off public assistance); *Townsend v. Sain*, 372 U.S. 293 (1963) (use of truth serum; denial of heroin to addict); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (5 day incommunicado detention); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (intimidation; 4 day detention); *Reck v. Pate*, 367 U.S. 433 (1961) (8 day incommunicado detention; 6-7 hours of interrogation for 4 days; denial of food); *Rogers v. Richmond*, 365 U.S. 534 (1961) (6 hour interrogation by 3 or more officers; threatened interrogation of petitioner's wife); *Blackburn v. Alabama*, 361 U.S. 199 (1960) (8-9 hour interrogation in a small room); *Spano v. New York*, 360 U.S. 315 (1959) (8 hour interrogation by as many as 15 officers; deceptive use of petitioner's friend to falsely arouse petitioner's sympathy); *Payne v. Arkansas*, 356 U.S. 560 (1958) (3 day incommunicado detention; threats of mob violence; denial of food); *Fikes v. Alabama*, 352 U.S. 191 (1957) (repeated questioning over 5 day period; incarceration in state prison far from petitioner's home; segregation from all other prisoners); *Leyra v. Denno*, 347 U.S. 556 (1954) (lengthy interrogation; deceptive use of psychiatrist masquerading as general practitioner to treat petitioner's ailment); *Gallegos v. Nebraska*, 342 U.S. 55 (1951) (25 day detention before presentment to magistrate); *Harris v. South Carolina*, 338 U.S. 68 (1949) (5 day incommunicado detention; repeated violence and interrogation); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (5 day interrogation by relays of officers for 4-6 hours

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the officer. The respondent had not been detained nor had he been asked a single question. Absent state action, there was no due process violation.[8]

II.

WHERE A SUSPECT IS ADVISED OF HIS MIRANDA RIGHTS AND ADMITTEDLY UNDERSTANDS THEM, HIS WAIVER OF RIGHTS IS VOLUNTARY IN THE ABSENCE OF POLICE ACTION TO INDUCE THE WAIVER.

The fifth amendment provides: "No person . . . shall be compelled, in any criminal case, to be a witness against himself . . . ." U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Court extended the

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per day); *Watts v. Indiana*, 338 U.S. 49 (1949) (6 day detention; interrogation by relays of officers); *Lee v. Mississippi*, 332 U.S. 742 (1948) (threats of violence); *Haley v. Ohio*, 332 U.S. 596 (1948) (5 hour interrogation by relays of officers; 3 day detention after confession); *Ashcraft v. Tennessee*, 327 U.S. 274 (1946) (36 hour detention); *Malinski v. New York*, 324 U.S. 401 (1945) (forced stripping to humiliate and frighten petitioner); *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (physical abuse and prolonged interrogation); *Ward v. Texas*, 316 U.S. 547 (1942) (nocturnal removal from county; threats); *Vernon v. Alabama*, 313 U.S. 547 (1941) (violence); *Lomax v. Texas*, 313 U.S. 544 (1940) (forced stripping); *Canty v. Alabama*, 309 U.S. 629 (1940) (incommunicado detention); *Chambers v. Florida*, 309 U.S. 227 (1940) (7 day incommunicado detention); *White v. Texas*, 309 U.S. 631 (1940) (7 day incommunicado detention; nightly whippings); *Brown v. Mississippi*, 297 U.S. 278 (1936) (repeated whippings).

[8]Although the due process clause of the fourteenth amendment was not violated, the inquiry whether the confession should be excluded from evidence as a matter of Colorado evidence law remains for the Colorado courts to determine. *See Lisenba v. California*, 314 U.S. 219, 236 (1941); Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash. U.L.Q. 275, 291-92.

fifth amendment privilege to "custodial interrogation": "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way" *See Michigan v. Tucker,* 417 U.S. 433, 442-43 (1974). To protect the privilege the Court imposed procedural safeguards designed to dispel the compulsion inherent in custodial interrogation. *Miranda,* 384 U.S. at 467; *North Carolina v. Butler,* 441 U.S. 369, 373 (1979). Absent custodial interrogation, no such procedural protections are required. *E.g., Berkemer v. McCarty,* 104 S. Ct. 3138 (1984). "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." *Miranda,* 384 U.S. at 478.

Before the police question a suspect who has been taken into custody, they must give the suspect *Miranda* warnings if his statements are to be admissible into evidence. *Miranda,* 384 U.S. at 379; *Michigan v. Tucker,* 417 U.S. at 443. The prosecution must show that a suspect voluntarily, knowingly, and intelligently waived his rights in order to introduce his statements against him in court. *Oregon v. Bradshaw,* 103 S. Ct. 2830, 2834-35 (1983); *Edwards v. Arizona,* 451 U.S. 477, 482 (1980); *Tague v. Louisiana,* 444 U.S. 469, 470 (1980); *North Carolina v. Butler,* 441 U.S. 369, 373 (1979); *Miranda,* 384 U.S. at 444. *Miranda* recognized that if a statement was made after lengthy or incommunicado detention, that would be "strong evidence that the accused did not validly waive his rights." 384 U.S. at 476. "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.*

Miranda was less specific about what would constitute an effective waiver.[9] Although an express statement waiving the rights to silence and to counsel is "strong proof" of an effective waiver, *North Carolina v. Butler,* 441 U.S. at 373; *accord Oregon v. Elstad,* 105 S. Ct. 1285, 1298 (1985), ultimately such an express statement is neither necessary nor sufficient. *North Carolina v. Butler,* 441 U.S. at 373. Not only must the prosecution show that the waiver was knowing and intelligent, but it must also demonstrate that the waiver was voluntary. *Edwards v. Arizona,* 451 U.S. at 482. The inquiries are discrete. *Moran v. Burbine,* 54 U.S.L.W. 4265 (U.S. March 10, 1986); *Edwards v. Arizona,* 451 U.S. at 484; *McCormick on Evidence,* § 153 (E. Cleary 3d ed. 1984).

By showing that a suspect (1) was told of his right to remain silent and right to counsel, (2) understood those rights, yet (3) intentionally relinquished those rights, the prosecution establishes that the suspect knowingly and intentionally waived his *Miranda* rights. *Moran v. Burbine,* 54 U.S.L.W. 4265; *see Edwards v. Arizona,* 451 U.S. at 483-84. By showing that the state exerted no pressures on a suspect, the prosecution establishes that the suspect voluntarily waived his rights. *See Moran v. Burbine,* 54 U.S.L.W. at 4267 ("The voluntariness of the waiver is not at issue . . . . [T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements."); *Michigan v. Mosley* 423 U.S. 96, 111 (1975) (White, J., concurring) ("voluntariness" is

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[9] "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement *could* constitute a waiver." *Miranda,* 384 U.S. at 475 (emphasis added).

the standard by which waiver of previously claimed right to remain silent by a "properly informed" defendant should be judged); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 199-201 (1977); Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1, 25 (1970); *cf. Wyrick v. Fields*, 459 U.S. 42, 53-54 (1982) (Marshall, J., dissenting) ("Since the underlying purpose of the [fifth amendment] privilege . . . is to prevent the State from coercing an individual to give evidence against himself, it makes sense to find a waiver of the privilege where a suspect's conduct provides assurance that his statements were made voluntarily.") Each discrete inquiry requires a review of the totality of the circumstances surrounding the waiver. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979); *see Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Colorado Supreme Court suppressed as a violation of *Miranda* all of the statements that the respondent made after he was first given the warnings.[10] Although the evidence showed that the respondent both understood and intentionally relinquished his *Miranda* rights, the Colorado Supreme Court held that the prosecution had failed to prove by clear and convincing evidence that the respondent

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[10]The Colorado Supreme Court improperly treated as analytically similar all the statements that the respondent made after he was first given the *Miranda* warnings. Yet the first statement Connelly made after being advised of his rights—that in late 1982 he had killed a young girl—was made when Connelly was neither in custody, *Berkemer v. McCarty*, 104 S.Ct. 3138 (1984), nor being subjected to interrogation, *Rhode Island v. Innis*, 446 U.S. 291 (1980). The first statement Connelly made after being advised of his rights, therefore, did not violate *Miranda*.

had effectively waived his rights. The Colorado Supreme Court therefore necessarily concluded that the respondent had not voluntarily waived his *Miranda* rights.

The Colorado Supreme Court applied an incorrect standard to determine the voluntariness of the respondent's waiver. By narrowly focusing on the respondent's subjective volitional capacity, the court not only failed to take into account the totality of the circumstances, *see Fare v. Michael C.*, 442 U.S. at 724-25, but it also overlooked the values that underlie the fifth amendment: protection of individuals against official coercion. *United States v. Washington*, 431 U.S. 181 (1977).

The fourteenth amendment secures against state invasion the same privilege that the fifth amendment guarantees against federal infringement: the right to remain silent "unless one chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *accord Davis v. North Carolina*, 384 U.S. 737, 740 (1966); *see* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 926-37 (1979) (arguing that in the context of custodial interrogation the fifth amendment privilege duplicates the protection of the due process test of "voluntariness"). The unfettered exercise of one's own will refers to the absence of official coercion, not to any subjective psychological condition. *Oregon v. Elstad*, 105 S. Ct. 1285, 1291 (1985) (the fifth amendment is not "concerned with moral and psychological pressures emanating from sources other than official coercion.") Just as improper pressure by the police on a suspect renders a suspect's confession "involuntary," in violation of the due process clause of the fourteenth amendment, so too does improper pressure by the police on a suspect render a

suspect's waiver involuntary. *See generally* Schulhofer, *Confessions and the Court,* 79 Mich L. Rev. 865, 880 (1981). The requirement that a waiver be voluntary simply means that the waiver must not be the product of official overreaching. *See Moran v. Burbine,* 54 U.S.L.W. at 4267 ("Once it is determined that a suspect's [knowing and intelligent] decision not to rely on his rights was *uncoerced,* . . . the analysis is complete and the waiver is valid as a matter of law." (emphasis added). Absent some official coercion, the fifth amendment has no application: "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington,* 431 U.S. at 181, *cited with approval in Oregon v. Elstad,* 105 S. Ct. at 1291.

Nothing in the record below suggests the police in any way induced the respondent's waiver. Accordingly, the waiver was voluntary.

CONCLUSION

The decision of the Colorado Supreme Court should be reversed.

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Supreme Court, U.S.
FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-660

In The

Supreme Court of the United States

October Term, 1985

THE STATE OF COLORADO,
Petitioner,

vs.

FRANCIS BARRY CONNELLY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF AMICUS CURIAE OF THE COALITION FOR THE FUNDAMENTAL RIGHTS AND EQUALITY OF EX-PATIENTS IN SUPPORT OF RESPONDENT

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I. STATEMENT OF INTEREST OF AMICI CURIAE

This brief amici curiae is being filed in support of the Respondent. Both parties have consented to the filing of this brief and their consents are on file with the Court.

Amici curiae, the organizational members of the Coalition for the Fundamental Rights and Equality of Ex-patients[1/] (hereinafter the "Coalition

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[1/] The participants in the Coalition for the FREE are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses. (Footnote continued)

for the FREE") are all groups whose primary interests and activities concern the promotion of public understanding of mental health issues and the protection of the rights of the mentally ill and of present and former mental patients.

NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

The New Jersey Department of the Public Advocate is a cabinet level agency of New Jersey state government. N.J.S.A. 52:27E-2. It has litigated extensively in major areas affecting "the public interest" for over ten years. The interest of the Department in this case arises from its long-term representation of persons charged with crime whose mental state is at issue.

The Department is specifically empowered to "represent the public interest in such administrative and court proceedings...as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27E-30.

Within the Department, the Division of Mental Health Advocacy was established to represent "indigent mental hospital admittees" in individual matters involving their admission to, retention in, or release from "mental hospitals," N.J.S.A. 52:27E-24, and to represent such persons in class actions on "an issue of general application to them," N.J.S.A. 52:27E-25. (Footnote continued)

Members and clients of these organizations include many former patients, their families and friends, as well as advocates for the mentally ill.

The Office of the Public Defender is administratively housed in the Department and provides criminal defense services to all indigent persons in the State charged with indictable offenses. See, N.J.S.A. 2A:158A-1 et seq. In 1984, the Public Defender represented indigents in 45,131 indictable cases. Of those, 44 were new capital punishment cases. Since the restoration of the death penalty in New Jersey, the Public Defender has represented a total of 89 defendants in capital cases.

The Department has participated before this Court both as counsel and as amicus curiae in a number of cases related to the issues before the Court here. See, e.g., Ake v. Oklahoma, 470 U.S. --, 105 S.Ct. 1007 (1985); Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043 (1983); Kremens v. Bartley, 431 U.S. 119 (1977); Strickland v. Washington, 104 S.Ct. 2052 (1984) reh. den. 104 S.Ct. 3562 (1984); Smith v. Sielaff, cert. granted, 54 U.S.L.W. 3262, (U.S. Oct. 21, 1985) (No. 85-5487) (argued March 4, 1986); and United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto prob. juris. noted, 54 U.S.L.W. 3292 (U.S. Nov. 5, 1985) (No. 84-1904) (argued March 26, 1986).

NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION

The National Mental Health Consumers Association was organized in Baltimore, Maryland in June, 1985, as a national representative voice for mental health consumers and charged with developing national forums so that the concerns of mental health consumers can be heard. (Footnote continued)

This case, like others in which the Coalition and/or its members have filed recent amicus briefs in this Court,

SHARE OF DAYTONA BEACH, FLORIDA, INC.

SHARE of Daytona Beach, Florida, Inc., organized in Daytona Beach in January, 1980, was incorporated in November, 1985 as a non-profit corporation in the State of Florida. SHARE's primary thrust is the rights of mental patients and former mental patients.

THE MENTAL PATIENT'S ASSOCIATION OF NEW JERSEY

The Mental Patient's Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

THE MONTANA MENTAL HEALTH CONSUMERS ADVOCACY PROJECT

The Montana Mental Health Consumers Advocacy Project, an unincorporated association formed in November, 1983 in Billings, Montana, is an ex-mental patient self-help and political action group, organized for the purposes of fighting discrimination and stigma and influencing legislation for the rights of mental patients.

involves issues of mental conditions and the rights of patients and ex-patients.[1a/] Indeed, the Respondent himself was, at the time of his confession, an ex-patient and is now again a patient. From the perspective of amici, the experience of Respondent is fairly typical of the legal "double bind" often faced by ex-patients: For the purposes of involuntary commitment and treatment, employment and housing, mental conditions are often presumed to be severely disabling; however, for purposes of disability benefits, and all aspects of criminal law and procedure (including the insanity defense, incompetency determinations and mitigation of punishment),

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[1a/] See, e.g., the brief amici curiae filed by the Coalition in United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto, above. See also, Brief of the Office of the Capital Collateral Representative et al. as amici curiae in Ford v. Wainwright, cert. granted, 54 U.S.L.W. 3392 (U.S. Nov. 10, 1985) (No. 85-5542).

these conditions are becoming increasingly as widely suspect and questioned as is Respondent's status here.[1b/]

In this case, the Court will hear arguments specifically on the effects of mental conditions on the voluntariness of confessions, and on the effectiveness of waiver of Miranda rights. Whatever this Court decides in this case will undoubtedly affect the outcome of similar cases in the future and will also likely impact on all proceedings involving the criminal law, confessions and/or mental conditions, including cases in the state courts. Therefore, amici curiae now wish

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1b/ This Court's caseload this Term itself reflects the increasing concern about these and related issues. See, in addition to this case, United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms v. Gallioto, above, and Ford v. Wainwright, above. See also Smith v. Sielaff, above; Allen v. Illinois, cert. granted 54 U.S.L.W. 3328 (U.S. Nov. 12, 1985) (No. 85-5404) (argued April 30, 1986); and Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

to share their specialized knowledge and insights with this Court and the parties in this case.

Amici curiae believe that no other party or amici in this case will make available to the Court these scientific research studies on the effects of schizophrenia and hallucinations on voluntariness and understanding, extensive material on such related issues as suggestibility and reliability, and the relevant caselaw on confessions, voluntariness and waiver. Amici curiae believe that they have a clear interest in this case, and can offer a significant alternate viewpoint on these issues to this Court.

II. SUMMARY OF ARGUMENT

In this Brief, amici curiae respectfully urge this Court to affirm the decision of the Colorado Supreme Court in this case on several bases. Our civilized system of justice has long recognized the disabling effects of certain severe mental conditions, such as those involved here, with respect to virtually all otherwise voluntary actions. Under this Court's precedents and other authorities on the voluntariness of confessions and the effects of mental conditions, the initial statement involved here must be suppressed because the ex-patient was not capable of acting freely or with the required understanding of the effects of his statement, as documented by scientific and academic research studies of schizophrenia, mental-condition related hallucinations and the

suggestibility issue as it is related to these conditions. Point III A.1.

By comparison to the effects of similar mental conditions on competency and responsibility at other stages of criminal proceedings, the ex-patient's condition clearly meets the applicable standards for negating the voluntariness of his confession. Similarly, other conditions analogous to the ex-patient's mental condition involved here have been widely held to negate the voluntariness of confessions. Elsewhere, this Court and other authorities have also accepted mental conditions such as those of this ex-patient for this purpose. Point III A.2.

The ex-patient's mental condition here also nullified the attempted Miranda warnings given by the police officer. Indeed, Miranda v. Arizona, 384 U.S. 436 (1966), itself involved mental

abnormality as one of the factors negating the confession. Miranda and its progeny all assume basic objective conditions of understanding and free will that are absent in this case. This Court and other authorities have denied waiver of Miranda rights in analogous situations involving low intelligence, youthful age, and other conditions interfering with an intelligent and free waiver. Relevant scientific and academic research studies document the effects of schizophrenia and hallucinations on cognition and voluntariness. Point III B.1.

Here, because of its proven disabling effects, the ex-patient's mental condition clearly meets the criteria for negating the effectiveness of any purported waiver of his Miranda rights. Point III B.2.

III. ARGUMENT

A. Under this Court's Due Process Precedents, the Ex-Patient's Initial Statement, Compelled by His Belief in a Divine Mandate, Must Be Suppressed as Involuntary.

1. Our Civilized System of Justice Has Traditionally Recognized Certain Severely Disabling Mental Conditions as Limitations on Voluntary Acts.

In its opinion in this case, the Colorado Supreme Court upheld the trial court's determination that Respondent's initial statement to the police officer was not voluntary:

> The testimony of Dr. Metzner established that the defendant on this occasion was suffering from a serious mental disorder which placed him in the dilemma of confessing his crime to the police or committing suicide. Given this state of evidence, it was within the court's prerogative to rule that the defendant's initial statement to Officer Anderson was not the product of a rational intellect and a free will notwithstanding the fact that this statement was neither solicited by the officer nor was the result of any form of police action.

People v. Connelly, 702 P.2d 722, 729 (Colo. 1985)

In the relevant section of its opinion, the Colorado Supreme Court cited, quoted, and relied upon, inter alia, Culombe v. Connecticut, 367 U.S. 568 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960) and Townsend v. Sain, 372 U.S. 293 (1963), for the basic propositions that such an involuntary statement is "not the product of a rational intellect and a free will" and that "(o)ne's capacity for judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." 702 P.2d at 728.

The Blackburn decision by itself belies the State's claims[1c/] that there

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1c/ The State's filings include its Jurisdictional Statement ("JS") and its Brief on the merits ("SB"). The briefs amicus curiae in support of the State include the brief of the Solicitor General of the United States ("USSG"), the brief of the American Psychological Association ("APA"), and the brief of the Americans for Effective Law Enforcement, Inc. et. al. ("AELE").

is simply no precedent for this decision by the Colorado Supreme Court.[2/] In Blackburn, this Court described the development of the law regarding these very issues up to that time, over a quarter century ago:

> [A] complex of values underlies the stricture against use by the state of confessions which, by convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.
>
> In the case at bar, the evidence indisputably establishes the probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

351 U.S. at 207 (emphasis added)

[2/] See, e.g., SB, at 10, 11; USSG Brief, at 11-17; AELE Brief at 6

Notwithstanding that language, however, the State and its supporting amici continue to contend that Blackburn, Culombe and Townsend necessarily require both police or "state" involvement in addition to an underlying, severely disabling mental abnormality in order to support a finding of involuntariness.[3/]

It is the position of the Coalition for the FREE that this Court, as well as other American and English legal authorities, have long recognized the limitations placed upon virtually all voluntary actions by the compelling nature of such mental conditions alone.[4/]

[3/] Id.

[4/] The earliest maxims from the Roman and common law document the disabling effects of mental conditions in a wide variety of legal contexts. See, e.g., furiosi nulla voluntas est ("a madman has no will"); furiosus absentis loco est ("a madman is in the same position as one who is absent"); furiosus nullum negotium contrahere gerere potest [quia non intelligit quod agit] ("an insane person cannot make a contract [because he cannot under-

(Footnote continued)

This judicial and societal recognition of the disabling effect of certain severe mental conditions and delusions has long resulted in the nullification or negation of the otherwise assumed voluntary nature of actions required for legal purposes

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stand what he is doing]"); furiosi stipulari non potest nec aliquod negotium agere, qui non intelligit quid agit ("an insane person who does not understand what he is doing cannot contract nor transact any business"); and furor contrahi matrimonium non sinit, quia consensu opus est ("insanity prevents a marriage from being contracted, because consent is essential.") Ballentine's Law Dictionary 537, 538 (1930), and cases cited therein. See I W. Blackstone, Commentaries 426-427 (1st ed. Oxford 1765-69) ("Blackstone") (invalid marriage contract); 2 Blackstone, 291 (voidable conveyance or purchase of land); 4 Blackstone 24 ("furiosus furore solum punitur" [a madman is punished by his madness alone]). This maxim appears in numerous English and American cases and treatises on the insanity defense. See, e.g., Broom, A Selection of Legal Maxims 5 (London 1845); Coke, The First Part of the Institutes of the Laws of England, or a Commentary Upon Littleton 247b (17th ed. 1817). See also, 1 Hale, The History of the Pleas of the Crown 29-37 (London, 1736); and Biggs, The Guilty Mind 47-56, 81-88 (1955). See also, The Digests (Pandects) of Justinian, 50, 17, 5 in 9 S. Scott ed., The Civil Law, 297 (1932) ("In business transactions, the condition of an insane person is one thing, and that of a minor...another, although neither may perfectly understand what is required of him, for an insane person cannot transact any business whatever....")

generally[5] and in the context of the criminal law in particular.[6] Thus, this Court and others have long and consistently recognized that the extent of a person's criminal accountability and responsibility may be limited in a number of contexts by such mental conditions and

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[5] Id.

[6] This Court itself has repeatedly quoted from one classic statement of this proposition as it applies specifically to confessions:

> And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.
> Hawkins, 4 Pleas of the Crown, c. 46, Section 34 ,425 (7th ed. 1795)

See, e.g., Watts v. Indiana, 338 U.S. 49, 54 (1949); See also, Moran v. Burbine, 54 U.S.L.W. 4625, 4270 n.1 (U.S. March 11, 1986) (No. 84-1485) (Stevens, J. dissenting).

delusions.[7]

The descriptions of these severely disabling mental conditions have themselves evolved with the law from the generalities first used, such as "madness," "lunacy" and "insanity,"[8] to the more specific diagnostic terminology presently used, which includes the terms applied to describe Respondent's mental condition in this case, "psychosis," "chronic paranoid schizophrenia," "delusions" and "command auditory

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[7] See, e.g., Blackburn, 361 U.S. at 281. See also, Greenwood v. United States, 350 U.S. 410 (1956) (commitment of mentally incompetent accused); Baxstrom v. Herold, 383 U.S. 107 (1966) (commitment of prisoner); Jackson v. Indiana, 406 U.S. 715 (1972) (commitment of mentally incompetent accused); Maggio v. Fulford, 103 S.Ct. 2261 (1983) (incompetency to stand trial); Jones v. United States, 103 S.Ct. 3043 (1983) (indefinite commitment of insanity acquitee); Ake v. Oklahoma, 105 S.Ct. 1087 (1985) (insanity defense of indigent); Wainwright v. Greenfield, 106 S.Ct. 634 (1986) (insanity defense); Ford v. Wainwright, above (execution of insane convict).

[8] See n.4 above. See, e.g., Greenwood, 350 U.S. at 413 See also, Blackburn, 361 U.S. at 277.

hallucinations."[9/]

Whatever the precise terminology employed, however, it is clear that this Court has recognized the linkage between such mental conditions per se and the "complex" of factors affecting our still-developing concept of "voluntariness." Blackburn, 361 U.S. at 207. The Solicitor General argues nevertheless that this case does not involve procedures "so offensive to a civilized system that they must be condemned under the Due Process clause of the Fourteenth Amendment" Miller v. Fenton, 106 S.Ct. 445 (1985). See USSG Brief at 12. Similarly, the Solicitor General argues that the proposed use of the initial statement here would "fall within the broad constitutional boundaries imposed

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[9/] See, e.g., Blackburn, 361 U.S. at 209 n.8, "regarding Blackburn's diagnosis as being 'psychosis', 'schizophrenia of the paranoid type' and having 'delusions'. See also Point III A.2. below.

by the Fourteenth Amendment's guarantee of fundamental fairness." Id.

It is the Coalition's position that permitting use of Respondent's initial statement would offend both our "civilized system" of justice and our sense of "fundamental fairness in the use of evidence whether true or false"[10/] and as perceived by the "traditions and conscience of our people."[11/] As shown above, our history supports a finding of involuntariness in cases involving severely disabling mental conditions. To encourage the State to seek a benefit in this way from the mentally disabled accused -- particularly as a direct result of their illnesses -- is truly to make such prisoners the "deluded

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10/ Lisenba v. California, 314 U.S. 219, at 236 (1941). See also, Rogers v. Richmond, 365 U.S. 534, 544 (1961).

11/ Griswold v. Connecticut, 381 U.S. 479, at 493 (1964) (Goldberg, J. concurring).

instruments of their own convictions"[11a/] in direct contravention of one of our basic legal traditions.

The State and its supporting amici would rely on such statements despite the explicit threat of divine compulsion and implicit promise of divine benefit involved[12/] just so long as the police themselves were not involved in either source of pressure. On this issue, the most compelling argument is derived from Hunter v. People, 655 P.2d 374 (Colo. 1982), the "private police" case relied on by the Colorado Supreme Court in its opinion in this case. 702 P.2d at 728. There, too, an agency other than the State had acted to compel a confession. Based on Hunter, the Colorado courts here correctly held that a confession obtained

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11a/ See Hawkins, 4 Pleas of the Crown, above at n.6.

12/ See Point III A.2 below, regarding this duality in Respondent's situation.

through such a Hobson's choice of death or self-incrimination could not be let stand simply because some other form of effective compulsion had privately been substituted for State involvement.[12a/] Surely, the use of a confession knowingly obtained by police after threats from a real, visible but independent third party would be no more "civilized" or "fundamentally fair" than would be the use of Respondent's initial statement.[13/]

12a/ See e.g., Simmons v. United States, 390 U.S. 377, 391 (1968) (regarding the "Hobson's choice" of choosing between 4th and 5th Amendment rights). See also, Green v. United States, 355 U.S. 184, 193 (1957) ("incredible dilemma") and Westin, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 Iowa L.R. 741, 744-5, n.14 (1981).

13/ To decide otherwise would be to invite a new form of private "vigilanteism" concerned with confessions rather than punishment. See, e.g., the cases cited in Respondent's Brief in Opp. ("RBO") at 10. Both the State and the USSG cite other cases on this still-emerging issue. See SB at 19 citing Kwiatkoski v. People, 706 P.2d 407 (Colo. 1985) (confession to supervisor and security consultant) and USSG Brief at 16, n.4 citing United States v. Murphy, 763 F.2d 202 (6th Cir. 1985) cert. denied 54 U.S.L.W. __ (U.S.Jan. 13, 1986) (No. 85-5350) (confession obtained through use of a police dog).

Similarly, the cases relied on by the Colorado Supreme Court are representative of cases involving other conditions and susceptibilities which this Court and others have recognized as limiting voluntary acts in this and related contexts.[14/] These cases -- and other authorities like Culombe, Blackburn and Townsend -- all document the develop-

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[14/] See, e.g., Fikes v. Alabama, 352 U.S. 192, 193 (1957) ("a schizophrenic and highly suggestible"), id. at 196 ("an uneducated Negro, certainly of low mentality, if not mentally ill")and id. at 197 ("a weaker and more susceptible subject"); Reck v. Pate, 367 U.S. 433, 443 (1961) ("a case of at least borderline mental retardation"); Spano v. New York, 360 U.S. 315, 322 (1959) ("history of emotional instability"); Leyra v. Denno, 347 U.S. 556. 561 (1954) ("almost trance-like submission"). See, generally, Ellis and Luckasson, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. L.R. 414, at 445 (1985) ("American courts have long recognized that confessions by mentally retarded persons are somewhat suspect...."). See also State of Tennessee Legislative Council Committee, Study on Mentally Retarded Public Offenders, 24 (1970) ("Coercion takes on an entirely different meaning when dealing with the retardate....A confession by a suspected retardate must be viewed with skepticism. . . .")citing Tomko, The Mentally Retarded Offender: A Problem for the Community and the Law (1968).

ment of our "civilized system's" sensitivity to the effects of such conditions on voluntary actions including confessions.

Another concern repeatedly noted by this Court in the context of compelled confessions is the issue of the reliability of the information divulged in such situations.[15/] See Blackburn, 361 U.S. at 207. To the extent that mental or other conditions may involve both delusions and suggestibility as well as communication problems,[15a/] the same issue of reliability is raised here as by State involvement in physical or mental torture through the most directly applied force or threats.

This Court and others have long conceded the pain and mental anguish

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15/ See Point III A.2. below, regarding the "suggestibility" of persons with mental conditions.

15a/ See Point III B.1. below, regarding the "language" problems of schizophrenics.

attendant to these conditions even in non-adversarial situations.[16/] Given the "suggestible" and delusional nature of these mental conditions, the fear-instilling context of criminal proceedings and the resulting concern about reliability, the presence or absence of the State as the prime motivator of a "compelled" confessions seems quite irrelevant to the "reliability" of what is still an essentially involuntary confession.

16/ See, e.g., Rennie v. Klein, 476 F.Supp. 1294, 1309 (1979) ("Medicine has not yet found a cure for the terrible pain of mental illness. The law cannot assist in this endeavor. But the constitution can and does prevent those who have suffered so much at the hands of nature from being subjected to further suffering at the hands of man."); See also, Watts v. Indiana, 338 U.S. 49, at 52 (1949) ("There is torture of the mind as well as body...."") and Parham v. J.R., 442 U.S. 584, 600, 601 (1979) ("In terms of public reaction the child who exhibits abncrmal behavior may be severely injured by an erroneous decision not to commit.") cf. Mincey v. Arizona, 437 U.S. 385, p. 401-402 (1978) ("But Mincey was weakened by pain and shock, isolated from family, friends and legal counsel and barely conscious, and his will was simply overborne.")

2. The Ex-patient's Mental Condition and Hallucinations Clearly Satisfy the Criteria for Suppressing His Initial Statement As Involuntary

In Miller v. Fenton, 106 S.Ct. at 453, this Court recently noted that "[a]lthough sometimes framed as an issue of 'psychological fact'. . . the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension." Describing that dual quality of voluntariness as "mixed," "hybrid" or "amphibian," this Court then said that this very dual nature "militates against treating the question as one of simple historical fact." Id. Here, under the caselaw set forth above, both the Respondent's mental condition and its effects satisfy the essential requirements of "involuntariness" under any legal standard or rubric.

For example, the concepts of "free will" and "rational choice" or "rational

intellect" can hardly be used to describe Respondent's mental condition at the time of his initial statement. Respondent's overriding compulsion to confess is apparent whether one chooses to rely on the transcripts of the testimony of the police,[17] the psychiatrist,[18] the public defender investigator,[19] or the psychiatric reports of Respondent's own statements.[20] In the first instance, the Respondent's diagnosed mental condition negated any possibility of "free will" or "rational choice", as the courts below

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[17] See Tr. 8-10 (Testimony of Officer Anderson) The hearing transcript was submitted to this Court as Exhibit 2 to RBO.

[18] See Tr. 55-58 (Testimony of Dr. Metzner)

[19] See Tr. 40-45 (Testimony of Ms. Lindecrantz)

[20] See Report of Colorado State Hospital re: Francis Barry Connelly, dated Oct. 2, 1983 ("the Report")

properly found.[21] Moreover, when considered in combination with his hallucinations, it can hardly be

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[21] As noted above, Respondent's diagnosis is "paranoid schizophrenia." The standard diagnostic manual notes that with this diagnosis in particular: "The impairment in functioning may be minimal if the delusional material is not acted upon...." Diagnostic and Statistical Manual of Mental Disorders, 3rd ed. (1980) ("DSM III") (emphasis added). As one authority noted, studies report "again and again and again" that schizophrenics are more impaired and perform less adequately than normals on cognitive tasks. Silverman, "Scanning Control Mechanism and 'Cognitive Filtering' in Paranoid and Non-paranoid Schizophrenia, "28 J. Abn. Psychol. 385 (1964) Another study, citing Silverman, above, stated that:

> Paranoid patients...would be expected to demonstrate considerable consistency in their judgmental behavior, although they might hold erroneous ideas regarding how task information should be used....Paranoid patients, while being highly consistent in their performance, would be expected to focus on incorrect cues, to evaluate the available information erroneously....(T)he rigidity of paranoid individuals would render them less able to use...feedback effectively.

Gillis and Blevens, "Sources of Judgmental Impairment in Paranoid and Nonparanoid Schizophrenics," 87 J. Abn. Psychol. 587, 588 (1978).

Finally, with regard to the overall reasoning process of schizophrenics, one leading study

(Footnote continued)

questioned that the total effect of all these factors on Respondent was extremely limiting on any purported "voluntary" activity regarding his initial statement

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observed:

> Normal thinking involves the purposeful manipulation of the internal images and ideas which form our stock of previously acquired information. In bringing our thoughts to bear on a specific problem we abstract from the total field of information that which is relevant to the task in hand. Thinking, or more accurately, reasoning, is thus a highly selective process in which inhibition is intimately linked with the degree of abstractness of the thought product. Indeed, the concept of control, direction and inhibition is central to the process of logical reasoning....It is this very lack of control, direction and inhibition which characterizes the disturbances of thinking reported by our patients.

McGhie and Chapman, "Disorders of attention and perception in early schizophrenia," 34 Brit. J. Med. Psychol. 103, 109 (1961) (emphasis added) See also, Owens, "When is a voluntary commitment really voluntary?" 47 Amer. J. Orthopsychiatry 104 (1977) ("It is certainly not being argued that any psychotic person is incapable of any voluntary action, merely by virtue of having a thought disorder....It is sufficient to note that the patient's difficulties are painfully obvious, and cannot be defined out of existence....But the psychiatrist cannot by any legal maneuver convert a patient's passivity and confusion into understanding and autonomy.")

to the policeman.[22] The disabling -- and threatening -- aspects of such compelling hallucinations have long been

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[22] With regard to hallucinations, the relevant research studies and leading academic commentators support a finding of their intensely compelling character. See, e.g., H. Kaplan and B. Sadock, eds. Comprehensive Textbook of Psychiatry 574 (4th ed. 1985):

> When schizophrenic patients are wide awake by all neurophysiological criteria, they may experience hallucinations as vivid as those experienced by normal people during dreams. They often act on these inner perceptions, as though they were more compelling than the external realities that compete for the schizophrenics attention....

See also, Id. at 683:

> The hallucinations may absorb all or much of the attention of schizophrenics, and may control their behavior considerably. While listening to voices, they may be preoccupied and oblivious to the environment.

See also Kolb and Brodie, Modern Clinical Psychiatry, 126 (10th ed. 1982):

> Hallucinations conveying a command are often convincing and compelling. They may therefore lead to direct and dangerous action. Considerations of reality are of little weight in comparison to their influence. (emphasis added) (Footnote continued)

noted.[22a]

Finally, the interrelated issues of "reliability" and "suggestibility" must be factored into the calculus of

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One research study concluded that "the true hallucinations of chronic schizophrenic patients are akin to actual perceptions in having positive reality characteristics and in being clearly discriminable from imagined objects and people." Aggernaes, "The Experienced Reality of Hallucinations and Other Psychological Phenomena," 48 Acta Psychiatrica Scandinavica 220 (1972) as noted in "Hallucinations" 6 Psychol. Med. 7 (1976) Other studies have noted the resistance of some persistent auditory hallucinators to treatment, Fonagy, "Punishment vs. Negative Reinforcement in the Aversive Conditioning of Auditory Hallucinations," 20 Behav. Res. Ther. 483 (1982) and the difference in hallucination experiences between schizophrenics and "normals," Mintz and Alpert, "Imagery Vividness, Reality Testing, and Schizophrenic Hallucinations," 79 J. Abn. Psychol. 310 (1972). A series of English studies have documented the linkage between hallucinations and psychological stress. See, e.g., Slade, "Towards a Theory of Auditory Hallucinations: Outline of an Hypothetical Four-Factor Model," 15 Brit. J. of Soc. Clin. Psychol. 415 (1976)

[22a] See, e.g., Simon, Mind and Madness in Ancient Greece, 104 (1978) (regarding Aeschylus' Choephoroi in which Orestes is taken over by forces out of control resulting in a drama of madness in which he is merely a participant rather than an active initiating agent). See also, Ray, A Treatise on the Medical Jurisprudence of Insanity, Section 167 (1838): (Footnote continued)

voluntariness in this case.[23/] We have already noted the caselaw concerning the "reliability" issue in connection with coerced confessions of the more conventional sort. See Point III A.1.

> A little strangeness of demeanor may, for months be the only perceptible deviation from the natural condition; the reason, in the meanwhile, struggling with the suggestions of the hallucinated sense, till it finally yields, and the patient, in obedience to some voice or vision, commits a sudden and fearful act of violence. (emphasis added)

The parallel between these historical descriptions and the facts here are compelling. See Tr. 52-3 (Testimony of Dr. Metzner) and n.51 below also as to the myth of Orestes. Here, in addition however, while Respondent clearly felt similarly "threatened" by his hallucinations, he apparently also believed that, at least by implication, he would be "forgiven" if he made the mandated confession. See, e.g., Report at 5 ("God was telling me to do it [confess]. . . if I wouldn't obey him, I would go to hell forever.") This expectation of even such an implied benefit -- divine forgiveness rather than eternal damnation -- provides the basis for another argument against the "voluntariness" of both Respondent's initial and later, post-Miranda statements. See, e.g., Dix, "Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions", 1975 Wash. L.R. 275.

23/ On these issues, one recent study concluded as follows: (Footnote continued)

above. However, the concern here is that Respondent's initial statement -- and the "initial statements" of future severely mentally disordered suspects -- may only reflect events in fact observed by a "false confessor" who himself is but an innocent witness or helpless victim rather than a guilty principal.[24/] But

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> Like delusions, confabulations are unconscious (citing DSM III)....Confabulations may be remarkable for their detailed nature, their changeable character from moment to moment, and for the extent to which they can be provoked or suggested.

Kerns, "Falsification in the Psychiatric History: A Differential Diagnosis," 49 Psychiatry 13 (Feb. 1986) (emphasis added)

Clearly, the fact pattern of Respondent's extended "tour" to locate the crime scene at least raises some question as to the reliability of his "initial statement" and as to other possible scenarios that could account for his knowledge of the crime. See Tr. 27-30 (Testimony of Detective Antuna)

[24/] A series of English studies trace the connection between the factors of personality, self-concept and intelligence in persons who admit to crimes they did not commit. See, e.g., Gudjonsson, "Interrogative Suggestibility: Comparison Between 'False Confessors' and 'Deniers' in Criminal Trials," 24 Med. Sci. & Law 56 (1984)

see APA Brief, at 28-29 regarding Respondent's "reliability."

Perhaps typically, the State and its supporting amici have raised the "floodgates" argument concerning possible "falsifying" of future widespread mental condition claims, the "administrative burden" contention of the difficulties in police recognition of real mental disorders and the potential "line drawing" problems between such disorders and other conditions such as drug or alcohol use.25/ In the first instance, the "falsifying" issue is hardly a novel one to this Court and to the legal

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25/ See, e.g., APA Brief, at 17, USSG Brief, at 8, 19.

system.[26] The recommendation of the APA itself belies its answer to the "falsifying" issue -- more reliance on "experts" rather than less (albeit, different experts).

The "administrative burden" issue problem is readily resolved by the weight of evidence required to support the finding that Respondent was mentally ill when he made his "initial statement."[27] The recognition of the problem by police requires only that police seek an earlier review by a mental health professional --

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[26] See Ray, A Treatise on the Medical Jurisprudence of Insanity, Section 247, at 243 (1838):

> (T)he supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease and is always put forward in objection to the more humane doctrines.

[27] See Report, at 1-5, Tr. at 47-70 (Testimony of Dr. Metzner)

again, as the APA itself seems to suggest.[28]

Finally, the "line drawing" issue is one always faced by this Court in its decisions. In the case of alcohol or drug induced confessions, this Court has already noted that there are distinctions between the nature of such conditions and that of the conditions involved here.[29] Moreover, the relevant research studies show some specific differences in the experience of such hallucinations and delusions arising from substance abuse as opposed to mental conditions.[30]

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[28] APA Brief, at 29-30

[29] Compare, Metropolitan Life Insurance v. Massachusetts, 105 S.Ct. 2380, 2384 n.10 (1985), with Powell v. Texas, 392 U.S. 514, 526-528 (1968) and Robinson v. California, 370 U.S. 660, 666 n.8 (1962)

[30] See, e.g., Aggernaes, "The Difference Between the Experienced Reality of Hallucinations in Young Drug Abusers and Schizophrenic Patients," 48 Acta Psychiatrica Scandinavica 287 (1972)

Even if these obvious negations of the "floodgates" argument did not exist, the number of individuals with disorders that would qualify for the protection is small.[30a/] Essentially only those who are correctly diagnosed as schizophrenic would be eligible[30b/] and the appropriately diagnosed individuals with that mental disorder is shrinking.[30c/]

30a/ See, e.g., H. Kaplan, and B. Sadock, eds., Comprehensive Textbook of Psychiatry, 647 (4th ed. 1985). (Lifetime prevalence rate of schizophrenia in North America has been found to be 1.1 to 1.9 per 1000.)

30b/ See, e.g. Taylor and Abrams, "The Prevalence of Schizophrenia: A Reassessment Using Modern Diagnostic Criteria," 135 Am. J. of Psychiat. 945 (1978). (Finding as few as 6% of all psychiatric hospital admissions are schizophrenic when the appropriate rigorous diagnostic criteria are used and effects of cultural sensitivity, theoretical bias, and availability of treatment modalities are factored out.)

30c/ See, e.g., Westermeyer and Harrow, "Prognosis and Outcome Using Broad (DSM II) and Narrow (DSM III) Concepts of Schizophrenia," 10 Schiz. Bull. 624 (1984). (When the older broad criteria were used, the authors diagnosed 153 schizophrenics. Under the modern diagnostic criteria, only 62 individuals were diagnosed as schizophrenic.)

Finally, the majority of individuals, who once had the acute symptomatology of schizophrenia described throughout this brief, will improve or recover and lead normal lives.[30d/]

30d/ See, e.g., Ciompi, "Catamnestic Long-Term Study on the Course of Life and Aging in Schizophrenia," 6 Schiz. Bull. 606 (1980) Harding, Brooks, Ashikago, and Strauss, Long-Term Course and Prognostic Studies in Schizophrenia (National Institute of Mental Health 40604 and 29575) (1985); World Health Organization, Schizophrenia: An International Follow-Up Study (1979); Bland and Orn, "Schizophrenia: Schneider's First-Rank Symptoms and Outcome", 137 Brit. J. Psychiat. 63 (1980).

B. Under this Court's Miranda Precedents, The Ex-Patient's Mental Condition Nullified the Attempted Miranda Warnings and Waiver

1. Under Miranda and its Progeny, Mental Conditions Can Render Warnings and Waivers Ineffective

On the issue of the effectiveness of the Respondent's purported waiver of his Miranda rights, the Colorado Supreme Court held as follows:

> In light of the psychiatric testimony presented to the district court, we see no reason to disturb the court's conclusion that the prosecution failed to prove by clear and convincing evidence that the defendant effectively waived his Miranda rights. The testimony of Dr. Metzner clearly established that the defendant's mental condition on August 18, 1983 was such that he was incapable of making an intelligent and free decision with respect to his constitutional right of silence while in custody and his constitutional right to confer with a lawyer before talking to police.

People v. Connelly, 702 P.2d 722, 729 (Colo. 1985)

The court based its holding on the decisions of this Court in Oregon v. Elstad, 105 S.Ct. 1285, 1292 (1985) and

New York v. Quarles, 104 S.Ct. 2626, 2631 (1984), regarding the presumption of compulsion created by custodial interrogation in violation of Miranda, and on two Colorado cases placing on the prosecution the burden of proving voluntary, knowing and intelligent waiver of Miranda rights, People v. Fish, 660 P.2d 505 (Colo. 1983) and People v. Lowe, 200 Colo. 470, 616 P.2d 118 (1980) See 702 P.2d at 729. For their part, the State and its supporting amici now argue to this Court that Respondent's mental condition did not interfere with his effective waiver of his rights.[31/]

31/ See, e.g., SB at 34 ("The evidence also indicates that the defendant was capable of understanding his rights and the official consequences of their waiver."); USSG Brief at 22 ("(R)espondent's Miranda waiver was valid and his inculpatory statements should not have been suppressed."); APA Brief at 26 ("[S]uppression of respondent's precustodial and post-Miranda statements is not necessary in order to further either of the values protected by the due process clause in this context"). In an ironic turn, both the State and the Solicitor General now argue that there was an effective waiver just because of Respondent's mental condition: (Footnote continued)

The Colorado courts correctly interpreted the relationship between Miranda "competency" -- for that is really what is at issue here -- and mental conditions such as that of Respondent. From its very beginning, the Miranda case itself involved the limiting effect of Ernesto Miranda's mental condition, as clearly appears from the record and papers in that case.[32/] There, as

> "Not only was the defendant's confession not induced by police action; under the circumstances he probably could not have been prevented from confessing."
> SB at 34.
>
> "[R]espondent's compulsion ensured that he would waive his rights regardless of any pressure from the police officers." USSG Brief at 30.

These two statements alone belie the argument by the State and its amici that there could be an "intelligent and free" waiver here.

32/ See Miranda v. Arizona, 384 U.S. 199 (1960) Petition for Certiorari, at 1 (Question Presented: "Whether the written or oral confession of a poorly educated, mentally abnormal, indigent defendant, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?") (Footnote continued)

here, this special -- and documented -- mental vulnerability of the defendant was clearly one of the issues of fact before this Court and hotly debated in the parties' briefs.[33/]

Subsequently, after Miranda, this Court and others have recognized and/or implicitly assumed the basic pre-conditions of understanding and voluntariness for the effectiveness of

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See also, Brief for Petitioner, at 3:

("A psychiatric report, made by a court-appointed psychiatrist gives the background of petitioner.... The doctor concluded that petitioner 'has an emotional illness, I would classify him as a schizophrenic reaction, chronic, undifferentiated type.'") (emphasis added)

33/ See, e.g., Brief for Respondent, at 1-2 ("While your respondent accepts the legal substance of the Question Presented as posed by the petitioner, serious issue is taken with the descriptive phrases, 'poorly educated, mentally abnormal.' The propriety of this description of the petitioner, insofar as it may enhance the question presented for review, is no doubt one of the key issues to be decided by the Court and respondent reserves the right to present argument, infra, concerning the description's accuracy and impact.") (emphasis added)

waiver of these rights. Thus, limitations on these basic pre-conditions have been widely recognized in studies involving low intelligence,[34] language difficulties,[35] educational deficien-

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[34] See, e.g., Ellis and Luckasson Geo. Wash. L.R. above, at 448 ("The capacity issue is likely to focus on the retarded person's ability to understand the warning which Miranda requires the police to give all suspects. The first issue is whether the retarded suspect understands the concepts which constitute the warning." The authors then noted that "It has been suggested that the anxiety some retarded defendants will experience upon being arrested may reduce their ability to understand the warning statement," and cited as authority on that issue F. Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services 185 (1977). See also, Note, "The Accused Retardate," 4 Col. Human Rts. L.R. 239, 251 (1972)

[35] See, e.g., Levitt and Lester, Insanity and Incompetence: Case Studies in Forensic Psychology, 59 (1984) ("It should be realized by the courts and police that many individuals who are arrested for alleged offenses do not speak English as their primary language and if interpreters are not available, there is a strong possibility that the safeguards inherent in the Miranda Warnings might be abridged.")

cies[36] and youthful age[37] as well as psychological abnormalities. In actual practice, even prosecutor and police manuals have recognized the limiting effect of mental and other conditions on effectiveness of Miranda waivers.[38]

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[36] Id. at 58-59 ("On the other hand, if the defendant can read, he has to be able to read at a third grade level in order to comprehend sixty percent of the words in the Miranda Warnings.")

[37] See, e.g., Seman, "A Juvenile's Waiver of the Privilege Against Self-Incrimination -- A Federal and State Comparison," 10 Am. J. Crim. Law 27, 45 (1982) ("The empirical data analyzed [regarding comprehension] appears to support the need for added juvenile safeguards.")

[38] See National District Attorneys Association, Confessions and Interrogations After Miranda: A Comprehensive Guideline of the Law, 57-59 (1978) (listing youth, education, insanity, and mental retardation cases on "The Competency of Defendant"). See also Department of Justice, State of California, Admissability of Out-of-Court Confessions, 6 (1972) ("The insane suspect. If the suspect lacks the mental capacity to understand what he is doing [after Miranda warnings], his confession is inadmissible.") and Inbau, Reed and Buckley, Criminal Interrogation and Confessions, 57 (3rd ed. 1986) ("Interrogators should be highly skeptical of the behavior symptoms of a person with a psychiatric history or psychopathic traits. Such a person who has committed a criminal act may appear to be innocent; on the other hand, an innocent person with a psychological affliction may seem to be guilty....[referring to the questioning of a particular suspect] (I)ndeed he had been in several mental institutions....[referring to another suspect's interrogation] The policewoman's

(Footnote continued)

Thus, despite the State and its supporting amici's arguments about the relevancy and effects of Respondent's mental condition, there is already a well-developed body of scientific studies documenting the disabling effects of such mental conditions on Miranda waivers.[39/] In addition, there is also an impressive body of legal commentary on the nature of

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past history revealed an "unstable personality" which undoubtedly accounted for the misleading behavior symptoms.") (emphasis added) See, on the issue of the importance of these manuals, Kamisar Police Interrogation and Confessions, at 62, 109 (1980). ("Kamisar") (Regarding the use of police manuals in the briefs and opinions in Miranda and in Escobedo v. Illinois, 378 U.S. 478 (1964).)

See also, Miller v. Fenton, 106 S.Ct. above, at 448 ("Detective Boyce presented himself as sympathetic to petitioner's plight. . . .[H]e stated that he did not consider petitioner to be a criminal because the perpetrator of the deed had a 'mental problem' and needed medical help rather than punishment.")

39/ See, e.g., Wulach, "The assessment of competency to waive Miranda rights" 9 Jour. of Psych. Law 209 (1981) ("The psychiatrist's responsibility in Miranda cases is to determine whether the defendant knowingly and intelligently waived his rights prior to confession. Typical cases referred to psychiatrists involve questions of retardation or psychoses....The Supreme Court has also specifically recognized mental retardation

(Footnote continued)

the linkage between voluntariness, Miranda rights and the effects of mental conditions such as that of Respondent here.40/ And even more specifically

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and psychosis as factors to be concerned in evaluating the capacity of a defendant to voluntarily resist police pressure for a confession. In a psychiatric assessment of a defendant's functioning at the time of confession, the clinician may be called upon to consider the defendant's capacity to make knowing and intelligent waiver of Miranda rights....") (emphasis added)

40/ The Court already has before it the leading articles, Grano, "Voluntariness, Free Will and the Law of Confessions," 65 Va. L. Rev. 859 (1979) ("Grano") and Schulhofer, "Confessions and the Court," 79 Mich. L. R. 865 (1981) ("Schulhofer") See the Brief of Amici Curiae, Colorado Attorney General, et al, at 5. However, both Grano and Schulhofer seem to support Respondent's position that his waiver was ineffective because of his mental condition. See Grano, at 903 ("Nevertheless, we cannot ignore the Court's numerous references to defendant's subjective characteristics....[T]he Court consistently has held that a defendant's physical or mental condition is a relevant factor. The Court thus recently held involuntary a confession obtained from a wounded defendant in a hospital intensive care unit. Cases such as these reflect society's basic sense of justice.") (emphasis added) See also, Schulhofer, at 873. See generally, "Developments in the Law-Confessions," 79 Harv. L. Rev. 938, at 977 (1966) ("Developments") ("Thus it could be argued that, once it is clear that the suspect's incompetence is

(Footnote continued)

relevant, there are numerous scientific studies of schizophrenia documenting the disabling effects of such conditions particularly on both the understanding and the volition of the affected person.41/ Similarly, there are also studies of the effects of hallucinations on understanding and cognitive ability as

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not so great as to create serious doubts about the reliability of his confession, his mental defects should not be considered in deciding whether the police can question him...." (emphasis added) Here, clearly, the evidence developed before the trial court showed just such an incompetence creating "serious doubt."

41/ See, e.g., Gillis and Blevens, Sources of Judgmental Impairment in Paranoid and Nonparanoid Schizophrenics," 87 J. Abn. Psychol 587 (1978) Of particular relevance are the still emerging studies of schizophrenia as a language dysfunction. See Chaika, "Thought disorder or speech disorder in schizophrenia," 8 Schiz. Bull. 588 (1982) (proposing that what previously has been viewed as a thought disorder should more precisely be considered a speech or language disorder) Contra Lanin-Lettering and Harrow, "The Thoughts Behind the Words: A View of Schizophrenic Speech and Thinking Disorders, 11 Schiz. Bull. 1 (1985). The debate on this issue continues up to the present time. See, e.g., Chaka and Lambe, "The Locus of Dysfunction in Schizophrenic Speech," 11 Schiz. Bull. 8 (1985). See generally, Glass "Schizophrenia and Language: The Internal Structure of Political Reality," 92 Ethics 274 (1982).

well, which have an obvious and direct relevance to the issue of the effectiveness of a Miranda waiver.[42/]

42/ See, e.g., Heilbrun, "Impaired Recognition of Self-Expressed Thought in Patients With Auditory Hallucinations." 89 J. Abn. Psychol. 728 (1980) ("Yet another way to explain why the hallucinator misinterprets the source of the perceived experience, at least in the case of auditory hallucinations, would be that those susceptible to hallucinations are generally less familiar with the characteristics of their own lexical (word) thinking than are those who are not. The logic is simple. The more limited one is in recognizing one's own thinking, the more likely it is that one will misidentify the source of a thought as being the voice of another (the usual auditory hallucination) when for any reason the discrimination is required between its having an internal or an external origin.") (emphasis added)

See also, Heilbrun and Blum, "Cognitive Vulnerability to Auditory Hallucination Impaired Perception of Meaning," 144 Brit. J. Psychol. 508 (1984) ("In the present study, reactive hallucinators displayed singular cognitive impairment in their ability to delay assignment of meaning to ambiguous stimuli and in availability of alternative meanings. This combination would be expected to reduce the quality of their perception by introducing errors of premature judgment, without the safeguard of subsequently considered alternatives.") (emphasis added) The APA repeatedly refers to the "statistical" norm for the effects of both schizophrenia and hallucinations.

(Footnote continued)

We have already noted, at Point III.A.1. above, the authorities on the issues of reliability, suggestibility, and possible falsification as related to mental conditions. Thus, just as with the Respondent's initial statement, there is a question as to the nature of the

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See, e.g., APA Brief at pp. 20, 26. There is an inherent logical fallacy in such generalizations, even those statistically supported. As one noted scientific commentator recently observed:

> "Variation" represents the fundamental reality of nature, not an accident about a created norm. Variation is primary; essences are illusory.
> Gould, The Flamingo's Smile (1985)

Here, only Respondent's condition and its effects on his will and understanding were at issue before the Colorado courts --not all schizophrenics or all command hallucinations.

effects of such mental conditions on the "validity" of his responses to the Miranda warnings.[43/]

43/ One of the more recent comments on the "reality" of hallucinations expressed the problem in these "lay" terms:

> "Even worse tricks are played in forming true hallucinations, in which there is no initial stimulus at all. The brain makes up what it hears, sees, feels, smells or tastes. Such experience may be very real for the person. A person who hallucinates voices talking to him may hear voices just as clearly as, or even more clearly than, the voices of real people talking to him....[I]n the sense that the brain hears them, they are real." Torrey, Surviving Schizophrenia: A Family Manual, 29-30 (1983)

Thus, such "real" hallucinations are at the polar extreme of the "out of sight, out of mind" situation this Court described recently as not affecting the "voluntariness" of the confession in Moran v. Burbine 54 U.S.L.W. above, at 4267 ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.") Here, the hallucinations "inside" the suspect and entirely known only to him thus clearly have such a bearing on his capacity "to comprehend and knowingly relinquish" his rights .

2. The Ex-Patient's Mental Condition and Hallucinations Rendered His Miranda Waiver Ineffective

There is no question here that Respondent was read his rights and that he appeared to waive them. [44/] However, as this Court held -- 28 years before Miranda v. Arizona -- every reasonable presumption will be indulged against the waiver of constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) [45/] Moreover, even the fact that Respondent signed a written waiver is not dispositive. North Carolina v. Butler, 441 U.S. 369 (1979). The ultimate question here -- answered affirmatively by both the trial court closest to the facts and the Colorado Supreme Court on appeal -- is whether Respondent's mental

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[44/] See Tr. 10, (Testimony of Officer Anderson), RBO, at 2.

[45/] In addition, Johnson v. Zerbst, 304 U.S. above at 464, held that "intelligent" and therefore "valid" waivers depended on the particular circumstances of the case "including the background experience and conduct of the accused."

condition rendered his spoken and written waivers ineffective.

Again, as with Respondent's initial statement, the entire record in this matter supports the presumption against an effective waiver. Whether basing the analysis on the psychiatrist's testimony as in the trial court,[46] the public defender investigator[47] the policeman[48] or the state hospital report,[49] the outcome is against waiver. The public defender investigator's testimony, in particular, supports the argument that Respondent's post-Miranda statements do indeed raise the "reliability" issue,

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[46] Tr. 55 (Testimony of Dr. Metzner)

[47] Tr. 40-43 (Testimony of Ms. Lindecrantz)

[48] Tr. 10, 12 (Testimony of Officer Anderson), Tr. 35 (Testimony of Detective Antuna)

[49] Report, at 4-6

just as does his initial statement.[50/]

It is clear that the Respondent's compulsion to confess was overwhelming and that neither the Miranda warnings nor any other "real world" considerations could have discouraged him, as both the State and the Solicitor General concede. See, SB at 34 and USSG Brief at 30. That the Respondent's severe mental condition -- rather than some less pathological

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50/ See, e.g., Tr. 42 (Testimony of Ms. Lindecrantz)

> "Everything that we asked him or seemed almost everything we asked he was very agreeable. He would say, yeah, and then we would say, what did we ask you, and he wouldn't know, and I think we all introduced ourselves several times, asked him--we had introduced ourselves at the beginning. We asked him a few minutes later; he didn't know. We asked him if he knew what we were; he didn't know. We asked him if he knew where he was; he didn't know. He didn't know what day it was, what time it was, and we would tell him and then go on with our questions and go back and say, do you know where you are? Do you know who we are, and he didn't."

See Point III A.1. above regarding the issues of suggestibility and reliability.

sense of guilt[51] -- clearly "caused" his singleminded fixation on divulgence is

[51] Recently, Chief Justice Burger commented on this motivational force:

> At times, it seems, the judicial mind is in conflict with what behavioral--and theological--specialists have long recognized as a natural human urge of people to confess wrongdoing. See, e.g., T. Reik, The Compulsion to Confess, (1959).

Michigan v. Jackson, 54 U.S.L.W. 4334 (U.S. April 1, 1986) (No. 84-1531) (Burger, C. J. dissenting at 4313)

However, even Reik, in his cited work, acknowledges the power of the forces acting on the compulsion:

> According to the psychoanalytic view, certain mechanisms of projection exist, especially in the most serious crimes. The criminal flees from his own conscience as he would from an external enemy; he projects this internal adversary outwards. Under this pressure, his weakening ego fights in vain and he becomes careless and betrays himself. When the internal forces become unbearable, he flees to the external ones, probably because it is a mental relief to do so--a relief which is in many cases greater than his fear of punishment. In studying the psychogenesis of conscience as Freud has described it, we understand why the external forces are so much less formidable than the mental ones. The Erinyes who pursue Orestes are reincarnations of his murdered mother: from these visible but intangible beings he flees to earthly justice and suffers its punishment because it is more merciful than that terror.

Reik, above, at 58-9 (emphasis added)

conclusive on the issue of his understanding and freedom to respond rationally to his Miranda warnings.52/

52/ The issue here -- resolved correctly by the state courts in this case -- was whether Respondent's compulsion was the product of his illness rather than his guilt. This distinction was noted as soon as Miranda was decided:

> For example, the studies of some psychologists suggest that many suspects may have an uncontrollable urge to admit guilt. If this "compulsion to confess" is considered irrational, it might be thought unfair to question such people. Yet such a phenomenon closely resembles the product of a guilt-stricken conscience, and it would be strange if it were constitutionally impermissible for the police to take advantage of the latter motivation. It may often be virtually impossible for a court to distinguish the promptings of conscience from the pressures of morbid guilt feelings in passing on the admissibility of a confession. Thus it could be argued that, once it is clear that the suspect's incompetence is not so great as to create serious doubts about the reliability of his confession, his mental defects should not be considered in deciding whether the police can question him, but should bear solely on his ultimate treatment. Developments, above, at 976-977 (emphasis added) Here, (as noted above regarding his initial statement at Point III A.2.) the state courts decided Respondent's incompetence was in fact "so great" regarding his Miranda waiver as well.

Thus, the court's finding on the issue of Respondent's "incompetency" to waive his Miranda rights is readily comparable to the treatment of an accused's incompetency to proceed to trial, to plead and to be punished.[53/]

[53/] See, e.g., Dusky v. United States, 362 U.S. 402, 403 (1960) ("We agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'") See also, Sadoff, "Forensic Psychiatry" in C. Wecht, ed. Forensic Sciences 32.02(a), 3-9 (1985) ("Active hallucinations, or delusions as symptoms of a major mental illness, may preclude a defendant's competency to proceed.") Recently, regarding the oral argument before this Court in Ford v. Wainwright, above, the "editorial summary" in U.S. Law Week noted these remarks made in the context of the issue of competency to be executed as it was being argued in that case:

> "Justice Rehnquist: Isn't it true that the only thing that separates competency from incompetency is the person's ability to come to terms with God?"
> 54 U.S.L.W. 3723, May 6, 1986.

Here, too, the Respondent was trying -- unsuccessfully it appears -- to come to terms with God regarding his perception of the divine mandate. See, e.g., Report, at 5,6.

As already noted, the issue of the effects of Respondent's mental condition on the effectiveness of his waiver is merely one small part of this Court's jurisprudence on the impact of such serious mental conditions on the various stages of criminal proceedings generally. See Point III A.1. above. It is difficult to credit the argument that in this case the whole structure of these carefully developed and interlocking principles should be ignored in favor of a particular "just" outcome, no matter how forced.[54/]

[54/] This case -- and some of the briefs -- raise the issue of which psychological theory or approach best suits the legal analysis regarding the effects of mental conditions on confessions and Miranda waivers. See, e.g., APA Brief at 25 ("As noted...behavioral science does not use or rely upon the concepts of 'volition' or 'free will'." Accordingly, Dr. Metzner was not testifying as a scientist when he testified that respondent's command hallucinations impaired his 'volitional' capacity.") This Court is well aware of the differing views and interests of the competing approaches of psychology and psychiatry. See, e.g., McCready v. Blue Shield of Virginia 457 U.S. 465 (1982). There can also be little argument

(Footnote continued)

This Court has already faced a similar problem in Brewer v. Williams, 430 U.S. 387, 395 (1977), where one issue was whether an escaped mental patient's

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about the Court's awareness of the shortcomings of both disciplines. See, e.g., Estelle v. Smith, 451 U.S. 454, 472 (1981) (psychiatric predictions of dangerousness) See also, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Addington v. Texas, 441 U.S. 418, 430 (1979); Vitek v. Jones; 445 U.S. 480, 495 (1980); Parham v. J.R., 442 U.S. 609 (1979) and Ake v. Oklahoma, 105 S.Ct. 1087, 1096 (1985) The existence of many alternative psychological schools--other than the "behaviorist" orientation of the APA Brief--is also as great a source of widely divergent views as are the different approaches in psychiatry. Compare, Stein, Contemporary Psychotherapies, (1961) with Frank, Persuasion and Healing, (1973). In any event, the APA's arguments should have been made by a prosecution expert at trial. Even then there is still some question as to their impact. See, e.g., Grano at 789:

> No less than the law of contracts or wills, the law of confessions says, albeit imperfectly, that an individual's choice can affect the legal outcome, provided that choice is free from significant impairment. The public generally understands and approves of the law of free choice, and we cannot eliminate this human sentiment simply by asserting the truth of determinism. (emphasis added)

Here, Respondent's mental condition clearly resulted in a "significant impairment" of his ability to choose freely, as the Colorado courts properly found.

"self-incriminatory statements on the automobile trip from Davenport to Des Moines had been involuntarily made."[54a/] The fact that there the police were also aware of the accused's background and vulnerability was as well-documented as it is here:

> "Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?"
>
> "A. I was sure hoping to find out where the little girl was, yes, sir."

430 U.S. at 399 (emphasis added)

And further:

> "Moreover, the statements were obtained only after Detective Leaming's use of psychology on a person whom he knew to be deeply religious and an escapee from a mental hospital -- with the specific intent to elicit incriminating statements."

430 U.S. at 402-3 (emphasis added)

In his concurring opinion, Justice

54a/ See also, Kamisar, at 113 ("Brewer v. Williams -- A Hard Look at a Discomfiting Record")

Stevens set out the reasoning in that case which now seems so apt here:

> Nothing that we write, no matter how well reasoned or forcefully expressed, can bring back the victim of this tragedy or undo the consequences of the official neglect which led to the respondent's escape from a state mental institution. The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular case before us.

430 U.S. at 415 (Stevens, J. concurring) (emphasis added)

In Brewer, this Court acted to protect the "underlying" issue -- the accused's Sixth Amendment rights against a claimed effective waiver by implication. Id. Here, the claimed waiver arising from a disabling mental condition is the issue "underlying the surface issues of this case." Id. Sadly, here too, nothing can bring back Marry Anne Junta. The result in this case, however, will surely affect the path of the law on these issues in the future.

CONCLUSION

For the reasons stated in this brief, amicus curiae, respectfully urge this Court to affirm the decision of Colorado Supreme Court in this case.

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Counsel also wishes to
acknowledge the assistance
on the brief of
Julie Heitmann,
Minda Maisel and
George Mulgrew, law clerks.